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1129.d.35.

Lex Testamentaria:

Or, A Compendious

SYSTEM

OF ALL THE

LAWS of *ENGLAND*,

As well before the Statute of *Henry* VIII. as ſince, concerning

Laſt Wills and Teſtaments.

In which are collected, all the Judgments and Reſolutions diſpers'd in the Year-Books, and all other Reports both in Law and Equity, what Eſtates in Fee, in Tail, for Life or Years, have been created by Wills either expreſly or by Implication.

Treating alſo of all CASES concerning

Executory Deviſes and Legacies.

And of all Actions, Pleas, and Judgments, by, for, or againſt

Executors, Adminiſtrators, and Guardians.

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A
SYSTEM
OF ALL THE
LAWS of ENGLAND,
As well before the Statute of Henry VIII.
as since, concerning
Last Wills and Testaments.
In which are collected all the Judgments and Resolutions differed in the Year-Books, and all other Reports both in Law and Equity, where Estates in Fee, in Tail, for Life or Years, have been created by Wills either expressly or by Implication.
Treating also of all CASES concerning
Executory Devises and Legacies,
Executors, Administration, and Guardians,
Wills or Administration, or as contrary to Limitations

THE PREFACE.

AT Common Law Lands were not deviseable, but only by Custom in some ancient Cities and Burroughs; and if the Heir or any other refused to deliver Possession to the Devisee, he had no Remedy but by the Writ ex gravi querelâ, *which was always directed to the Chief Magistrate of the Place where the Lands were, and executed by him. But this Method hath been disused since the Statutes 32 & 34 H. VIII. which enable Men generally to dispose their Estates by Will; and since these Statutes, the Possession is recover'd by* Ejectment, *and so many Cases have been adjudg'd on Wills, that they make a considerable Part of the Law.*

'Tis a Conveyance which differs from all other; for in Deeds apt and proper Words are requir'd to pass Estates; but 'tis a Rule in expounding Wills, That the Law shall interpret the Words, and direct the Operation according to the Intent *of the Testator, both as to the Description of the Person, and the Limitation of the Estate.*

The Difficulty is to find out what a Man intended *after he is dead; and concerning such* Intentions, *there have been so many nice Speculations and fine Constructions both of Words and Sentences, that a Man may with great Truth affirm, many Wills have been made after the Testator himself hath been dead.*

It was the Construction of Wills which perplex'd my Lord Coke *more than any other Sort of Learning: For in a Case which concern'd the* Property *of Goods, he could readily divide* Property *into* jus Proprietatis tantum, jus Possessionis tantum, & jus Proprietatis & Possessionis; *and then like a true Logician tells us, that* jus Proprietatis *ought to be* Proprium in quarto modo.

3 Bulst. 33.

And to shew that he understood Opticks, *he tells us,* speculum Artis est Vitrum, speculum Corporis est Oculus, & speculum Animæ Scientia. *And in an Action brought against a Surgeon for applying bad Medicines, he easily understood so much of Surgery, as to tell the Council there were three Kinds of Medicines,* Medicamenta benedicta, *and those cure;* Medicamenta sperabilia, *which probably may cure, and those are bad;* and Medicamenta imperita, *which were worst of all.*

3 Bulst. 133

2 Bulst. 234

And yet although his Knowledge was so extensive he freely confesses, that he did not understand how to make a right Construction of Wills, and he gives a good Reason for it, because it exceeded the Art of Lawyers so to do.

Justice Doderidge *agreed with him, that it was the most difficult Thing in the Law to make a true Construction of Wills. And my Lord* Hales *tells us in* Fry *and* Porter's *Case, That a Will may be* any Thing, every Thing, Nothing, *and the Reason is plain; for when a Man is sick, and yet hath a disposing Power, he usually writes Nonsense, and then the Judges must rack their Brains to find out what he* intended.

This hath made them sometimes reject a plain and grammatical Construction of a Sentence, and to supply the Intention *with logical and argumentative Words: Thus the* Singular Number *hath been taken for the* Plural, *the* Præterperfect Tense *for the* Present Tense, *the* Adverb *Also for the* Copulative *And, one* Adjective *for another, as* Any *for* Both; Dis-junctives *have been turn'd into* Copulatives, Indefinite Propositions *into* Universal. *Words and Sentences have been* transposed, *to make all the Parts of a Will agree, and sometimes a* Word *hath been added, as in Sir* Andrew Corbett's *Case.*

These Instances, and many more of this Nature, may be found in the following Cases, which the Publisher hath collected with so much Care, that he hath not omitted in this Edition any which are reported in the Law Books now extant, either concerning Wills, Executors, Administrators, Legacies, Devises, &c. *And this in a plainer and more useful Method than hitherto hath been done, either by Justice* Doderidge, *Mr.* Hughes, *Dr.* Godolphin, *or any other Writer on this Subject. And because the Book may be of some Use to many other Persons besides Lawyers, he hath endeavour'd to make it pleasant, as well as profitable to the Reader.*

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Adminiſtrator and Adminiſtration.

THE Word *Adminiſtrator* is not known either in the Civil or Canon Laws, in any other Senſe than relating to *Publick Government.* The firſt of theſe Laws makes Heirs, and giveth them the Right of Succeſſion to Lands: But it is the Law of Conſcience which giveth the Adminiſtration of the Goods of the Deceaſed to many Perſons, amongſt whom, the Children are firſt to be admitted; and if there are none, then the next of Kin in the Male Line; if none of thoſe, then the next of Kin in the Female Line: But by our Law, the next of Kin of both Sexes are equally admitted; as ſhall be ſhewed hereafter.

Neither was the Word *Adminiſtrator* known in our Law before the Statute 31 *E.* 3. ſince which Time, he hath been called *Executor dativus*, becauſe he is appointed by the Ordinary; and like an Executor appointed by the Teſtator himſelf, he is liable to pay the Debts of the *Inteſtate*, and therefore, like him, is entitled to all his Goods and Chattels.

Before I treat of the Particulars relating to *Adminiſtrators*, it may not be improper to give my Reader an Hiſtorical Account, by whom,

and in what Manner the Goods of *Intestates* were formerly disposed in *England*.

9 Rep. in Hensloe's *Case*, 38 *b*.

My Lord *Coke* tells us, That the King, who is *Parens Patriæ*, and hath the supreme Care to provide for his Subjects, that every one might enjoy his Right, did usually, by his Officers, seize the *Intestates* Goods, and dispose them towards his Burial, and to pay his Debts, and what remained was for the Advancement of his Wife and Children, and if there were no such, then to the next of Kin; and to prove this, he cites the close Roll, 7 *H.* 3. *Rot.* 16. *viz. Bona intestatorum capi solebant in manus Regis, &c.* but the King usually left the Disposal thereof to the Ordinary; because he who took Care of the Souls of Men when living, was esteemed the fittest Person to dispose of their Goods when dead.

But Mr. *Selden*, who had seen that Record, gives us a different Account of it, *viz.* The King wrote to the Sheriff of *Lincoln*, That *Constat nobis per inquisitionem nobis missam sub sigillo Stephani de Segrave & aliorum proborum hominum quod Richardus filius Dunæ Non obiit intestatus*, therefore he commanded the Sheriff to deliver all his Goods *in manus nostras capta, &c.* to the Prior of *Lockton*, and other his Executors, *ad faciend' testamentum.*

Now 'tis probable by this Record, That *Fitz Dune* was indebted to the King, and when that Debt was paid, he wrote to the Sheriff to deliver the Goods which he had seized; it being customary in those Days, when the King's Tenants died in his Debt, for the Sheriff, or other Officers, to seize their Goods to discharge that Debt; and this appears by *Magna Charta*,

Charta, cap. 18. where the Sheriff is commanded *attachiare & imbreviare bona & catalla defuncti* to the Value of the Debt, *& quod reſiduum relinquatur Executoribus ad faciend' teſtamentum & ſi nihil nobis debeatur ab ipſo omnia catalla cedant defuncto ſalvis uxori ejus & liberis ſuis rationabilibus partibus.*

Tis to be obſerved, That the Word *Executors* in this Place, did not imply that there was a *Will*; for whoſoever medled with the Inteſtate's Eſtate, was call'd an *Executor*, there was no *Adminiſtrator* till the Statute 31 *Ed.* 3. *ca.* 11. as hath already, and ſhall be farther obſerved hereafter. And when he who poſſeſſed himſelf of the Inteſtate's Eſtate, diſpoſed it in ſuch Manner as he apprehended the Inteſtate would have done, this in the Language of that Time was *facere teſtamentum.*

This is a true Account of that *Roll*; ſo that it ſeems extraordinary, that my Lord *Coke* ſhould cite a Record to prove a Cuſtom for the King to ſeize Inteſtates Eſtates, when there is not a Word in it of the Parties dying inteſtate, but quite contrary. And if there had been any ſuch Cuſtom, it would have appeared in ſome other Record or Writing of that Time, but there is nothing to be found which looks like it.

His Proof is much of the ſame Nature which he brings to prove, that the Care of the Diſpoſal of Inteſtates Goods was uſually left to the *Ordinary*; for he tells us, it was granted to them by a *Conſtitution of Archbiſhop* Stratford, *Anno* 4 *R.* 2. made in a Provincial Synod by him held in *London*, *Anno* 1380, and this he tell us was *conſenſu Regis & magnatum regni,*

whereas that Archbishop was dead above 30 Years before that Time.

But 'tis plain, both from Records and History, that in the Time of our *Saxon Ancestors*, the chief Lord of the Fee disposed the Goods of his Tenants dying intestate in Time of Peace; 'tis true he was entitled to an Heriot, but the rest of the Personal Estate was, by his *Direction* and Advice, *divided* between the Widow and Children, and next of Kin, *according as to every one of them of Right it belonged*; that is, according to natural Right, by which the Children excluded all the Kindred of a more remote Degree, and therefore the Rule was, *si liberi non sunt proximus gradus in possessione fratres patrui avunculi, &c.*

Lambert fo. 122.

And this likewise appears by the Laws of King *Canutus* the *Dane*, viz. *where a Man dies intestate*, the Lord shall not take his Goods, except what is due to him for an Heriot, but *all* is to be distributed by *his Judgment* to his Wife, Children, and next of Kin, justly according to their several Rights.

'Tis true, by this Law the Wife had a *Right* to her distributive Part, and so it continues to this very Time, I mean a Right by which a Property is vested in her distinct from her Children: But by the Civil Law 'tis otherwise, for if there are Children, and she survive her Husband, the Property of his Goods, is, by that Law, vested in them, and the Wife hath only the Use thereof during Life; and if she marry again, she is then to give Security to restore the Goods to her Children by the former Marriage.

And

And as the Wife had her Right, ſo the Children had theirs, for in thoſe Days Goods as well as Lands paſſed by Deſcent, and the Lord of the Fee was in the Place of a Judge, to ſee that there ſhould be an Equality in the Diſtribution, as well of the Goods as the Lands.

I admit that by the ancient *Britiſh* Laws, the eldeſt Son inherited his Father's *Earldoms* and *Baronies*, but his Freehold Lands deſcended to all his Sons equally; this appears by the Laws of *Edward* the Confeſſor, confirm'd by the Conqueror, and recited by Mr. *Lambard*, Fol. 167. and alſo by Mr. *Selden* in his Notes upon *Eadmerus Lege 36 de inteſtatorum bonis, &c. (viz.) ſiquis inteſtatus obierit liberi ejus hereditatem equaliter dividant.* Fol. 184.

But *William* the Conqueror finding it inconvenient to have Inheritances thus ſubdivided, and having gotten the Demeſnes of the Crown, and the Lands of all thoſe who oppoſed him, he gave thoſe Lands to his Friends, reſerving certain honorary Tenures for the Defence of the Kingdom; and the Lands which were held under thoſe Tenures, did, according to the Cuſtom of *Normandy*, deſcend to the eldeſt Son. And becauſe there were many of thoſe *Honorary Infeudations* in all Parts of this Nation, thoſe Tenures, in the Courſe of about 200 Years, introduced and ſettled a Parity in the Succeſſion of Lands held by other Tenures, except in *Kent*, and in ſome ancient *Burroughs*, where a contrary Cuſtom ſtill prevailed; and 'tis probable, that by the Policy of the Common Law, Men were permitted to diſpoſe their Inheritances in ſuch *Burroughs* by their laſt Wills, on Purpoſe to break in upon that Cuſtom, and ſet-

tle their Lands upon the eldeſt Son; for before the Statute 32 *H.* 8. they could not do it in any other Places by *Will.*

But to return. It hath already been obſerved, that the Diſpoſition of Inteſtates Goods was in the chief Lord; but that muſt be underſtood in Caſe he was his immediate Tenant, and died at Home and in Peace: But if he was not his Tenant, or if he died in his Lord's Army, then his Goods were under the Juriſdiction of that Temporal Court where they actually were at the Time of his Death, or where the Party himſelf died; that is, the Goods were to be divided amongſt the Wife, and Children, and the next of Kin, by the Juriſdiction of that Court, according as to every one of them of Right it belonged.

Regiſter 142 *b.* And this appears by the Writ *de rationabili parte bonorum* long before the Conqueſt, and ſo the Law continu'd till the Reign of *H.* 1. who by his Charter granted, That if a Man died without diſpoſing his Money or Eſtate, his Wife or Children, or next of Kin, or lawful Tenants, ſhould divide it amongſt them *for the good of his Soul.*

Mr. *Selden* tells us, this is the firſt Account we have of any Diſpoſition of Inteſtates *pro ſalute animæ*; and tho' by thoſe Words the Ordinaries *might* have claimed ſome Power in ſuch Caſes, as having the general Care of Mens Souls in their reſpective Dioceſes, yet they had no ſuch Authority at that Time, nor in the Reign of his Son and Succeſſor *H* 2.

'Tis true, *Glanvill*, who wrote in that Reign, mentions ſome Juriſdiction which the Ordinaries then had concerning laſt Wills and Teſtaments,

ments, and that an Executor was so essential to a Will, that if none was appointed by the Testator, his next of Kin might take upon him the Executorship, in order to maintain a Suit in the King's Courts against such who hinder the Payment of Legacies; but not a Word concerning the Jurisdiction of the Church about Intestates Goods.

So that it must be a Mistake of those who affirm, That at Common Law, before any Constitution or Statute made in such Cases, the *Ordinary* might take the Goods of Persons dying intestate to dispose in *pios Usus*; 'tis true, he did after the Reign of *H.* 2. claim such a Power without any Manner of Account to be given to Creditors, pretending, that a spiritual Judge was not subject to a temporal Suit for such Matters, neither did they allow, that the Payment of the Intestates Debts was *pro salute animæ*, or to be reputed *inter pios Usus*; but this was a short Usurpation upon the Common Law, and had certainly been a great Defect in it, if any such Usage had then prevailed.

But 'tis quite otherwise; for the first Charter or Law which gave the Ordinaries any such Power, was made about about 37 Years afterwards, *(viz.) Anno* 17. *Joh'is at Runningmeds*: Which is thus;

ff. *Si aliquis liber homo intestatus decesserit catalla sua per manus propinquorum, parentum & amicorum suorum per visum Ecclesiæ distribuantur salvis unicuique debitis quæ defunctus ei debebat.*

Now it appears by this famous Charter, which is *verbatim* in *Matthew Paris*, and by the Record it self in the *Cotton* Library, that the greatest Prelates of the Kingdom were present when it Page 344. Augustus A. 2.

Selden's *Tracts*, Cap. 3. Tyrel, Vol. 2. App. fol. 18.

was granted, *viz.* *Stephen Langton*, Archbishop of *Canterbury* and Cardinal, *Peter de Rupibus*, Bishop of *Winchester* and Lord Chief Justice, *Hugo Wallis*, Bishop of *Lincoln* and Lord Chancellor, the Bishops of *London* and *Worcester*, and others. And 'tis probable, when they saw the King's Resolution to grant this Charter of the Liberties of his Subjects, they, by their Interest, procured the Words *per visum Ecclesiæ* to be inserted, for the Advantage of themselves and their Successors, as it afterwards proved; for they did not distribute the Goods of Intestates to the next of Kin as they ought, but kept Part for their own Use; and this was thought by the Lords of those Intestates whose Tenants they were, to be a Diminution of their Right; and therefore, notwithstanding that Charter, they still claimed a Power to see their Goods distributed, without the Consent or interposing of the Ordinary.

But about 40 Years afterwards, *viz.* *Anno* 42 *H.* 3. a Constitution was made on Purpose to defeat the Lords of that Right, *viz.* That the Intestates Goods *Non Capiantur in manus Dominorum, sed solvantur debita ipsius & residuum in usus filiorum suorum & proximorum indigentium pro salute animæ defuncti in pios usus per ordinarios committantur nisi quatenus fuerit Domino suo obligatus.*

Where by the Way we may observe, what was meant by the Ordinaries committing the Intestates Goods *pro salute animæ & in pios usus*, not that they should reserve any Part of it to the Use of the Church, for that was not the *pius usus* intended by this Constitution; but that the Debts of the Intestate should first be paid,

paid, for that was *pro ſalute animæ*; and afterwards the Reſidue was for the Uſe *filiorum ſuorum & proximorum indigentium*, which was the moſt natural and pious Uſe that could be made of it.

But ſtill the chief Lords of the Fee would contend with the Prelates in many Places for their ancient Right; and therefore, about Eleven Years afterwards, Cardinal *Ottobone*, who was ſent Legate hither by Pope *Clement* IV, ſummoned the Prelates and dignified Clergy of *England* to a Synod which he held in *London*, and there he publiſhed ſeveral Decrees, and amongſt the reſt, this Inhibition, which may be ſeen in *Lindwood*.

ſſ. Super bona ab inteſtato decedente proviſio quæ olim a prælatis regni Angliæ cum approbatione Regis & Baronum dicitur emanáſſe nos firmiter approbantes, diſtrictius inhibemus ne prælati vel alii quicunque bona inteſtatorum quocunque modo recipiant vel occupant contra proviſionem præmiſſam, and this Inhibition he commanded by his Legantine Authority, to be obſerved throughout the Kingdom.

From which it may be obſerved, That the Power of Diſtribution of Inteſtates Eſtates, *per viſum Eccleſiæ*, did originally proceed a *Prælatis Angliæ*; but with the Approbation of King *John* and his Barons, as by the Charter made in his Reign it appeareth, and had ſo prevailed here in the Courſe of about 50 Years, from the very firſt Grant of any ſuch Power by that Charter, that *Bracton*, who wrote in the Reign of *H.* 3. and who was a Judge himſelf, tell us, That *ſi liber homo inteſtatus & ſubitò deceſſerit dominus ſuus nil intromittat de bonis defuncti niſi de hoc* Lib. 2. Cap. 26. Sect. 3.

hoc tantum quod ad ipsum pertineret (viz.) quod habeat suam Heriot sed ad Ecclesiam & amicos pertinebit executio bonorum, and the same may be seen in *Fleta*, who wrote many Years after him.

Lib. 2 Cap. 57.

It was grown into a Custom at that Time, that the Church should have a third Part of the Intestates Goods; for Pope *Innocent* IV. who wrote about the Middle of the Reign of our *H.* 3. tells us, that *Mos est in Britannia quod tertia pars bonorum decedentium ab intestato in opus Ecclesiæ & pauperum dispensanda.* But that would not content the Pope, for by his Emissaries here, the Goods of all Clergymen dying Intestate were seized for his Use; and 'tis probable, that some of the Prelates who lived in that Age, in Imitation of the Head of the Church, might seize the Goods of the *Laiety* dying Intestate, to their own Use. For I find it was countenanced by some Lawyers at that Time, who invented Arguments to support such Usage; as for Instance they alledged, that when a Man died Intestate his Goods were left to the World, and in such Case as a Freehold of Lands must be in some Body, so must the Property of Goods; and therefore the Law cast them on the Ordinary, as the fittest Person to dispose of them for the Good of the Soul of the deceased.

Tit. de Simonia Cap. ad Apostol.

They did not apprehend that paying his Debts and distributing the Surplus amongst his Relations, could in any wise conduce to the Good of his Soul, but rather the Prayers which they offered up for that Purpose, and for which they were paid by converting his Goods to their own Use.

By

By this Means they eluded the Force of those Constitutions, and defrauded Creditors of their just Debts; and this might be the Occasion of making the Statute *West.* 2. about 30 Years afterwards, by which it was enacted, that where *a Man dies Intestate and in Debt and the Goods came to the Ordinary to be disposed, he,* de Cætero, *shall satisfy the Debts so far as the Goods extend, in such Sort as the Executors of such Person should have done, in Case he had made a Will,* &c. Cap. 19. Anno 13 Ed. 1.

My Lord *Coke* tells us this Statute was made in Affirmance of the common Law, his Meaning must be, that the Ordinaries were bound by the common Law, before this Statute, to satisfy the Debts of the Intestate, so far as his Goods which came to their Hands did extend. 'Tis true, they were bound in Conscience to do it, but 'tis plain from the Usage of that Time, and from the very Words of the Statute, that it was seldom done, because it was enacted, that the Ordinaries, *de cætero,* should satisfy the Intestate's Debts, which signifies, that for the Time to come they should do so, and that implies that they did not do it before.

So that I rather take this Statute to be introductive of a new Law, because I do not find that before that Time, there was any Law in Force to compel them to pay the Intestate's Debts, for 'tis agreed on all Hands, that an Action of Debt would not lye against them at the Suit of any of the Creditors, tho' they sold the Goods and did not pay the Debts.

But after the making that Statute they were to be sued as Executors were before, and not long afterwards a Writ was framed against them

them for that Purpoſe, which is to be ſeen in the *Regiſter*, and in the *Naturâ Brevium*, (viz.) *Præcipe* T. *epiſcopo* C. *ad cujus manus bona & catalla quæ fuerunt* B. R. *qui obiit inteſtat' ut dicitur devenerunt quod juſte, &c. reddat.*

Reg. 141. F. N. B. 139.

But that Statute was found to be defective, (*viz.*) by ſubjecting the Ordinary to Suits, and yet giving him no Remedy to recover any Debt due to the Inteſtate; 'tis true, he was chargeable no farther than the Value of the Goods which *actually came to his Hands*, as appears by the very Words of the Writ, and in ſuch Caſe, and not otherwiſe, he might have an Action of Treſpaſs before this Statute, againſt any one who took them out of his Poſſeſſion.

So that by this Law the Ordinaries were made Debtors, and many Actions were brought againſt them by the Creditors of Inteſtates, and not only againſt them but againſt their Executors which continued for the Space of 70 Years, and then they were eaſed of this Trouble by another Statute made *Anno* 31 *Ed.* 3. by which it was enacted, ſſ. *That the Ordinaries ſhould depute the next and moſt lawful Friends of the Inteſtate to adminiſter his Goods, and thoſe Deputies ſhould have the Benefit and incur the Charge of Executors, and ſhould alſo be accomptable to the Ordinaries as Executors*, &c.

Fitz. Ab. tit. Brief, 822.

Cap. 11.

It muſt be admitted that they might make Deputies before this Statute, but then ſuch Deputies could bring no Action to recover the Goods of the Inteſtate, but now the Ordinaries had a very eaſy and ſafe Juriſdiction, free from all manner of Importunities and Suits by Creditors, retaining only the Power of granting

ing Administrations to particular Persons, and afterwards calling them to accompt before them.

And this was the Original of an *Administrator*, for before this Statute there was no such Name in our Law; for at Common Law whoever possess'd himself of the Intestate's Goods was chargeable by the Name of Executor, for every Executor is an Administrator of the Goods, and the Pleading is *ne unques* Executor, *ne unques administravit*, as Executor; and so it is resolved in *Snelling*'s Case; and my Lord *Coke* tells us, * that if a Stranger took away the Intestate's Goods, an Action of Debt did not lie against him as Administrator, but as Executor.

Snelling's *Case*. 5 Rep. 82. *b*. Cro. Eliz. 409. * 2 Inst. 398.

But after this Statute the Name was changed from an *Executor* to an *Administrator*, and he had such an absolute Property in the Goods, that he could maintain an Action by that Name, and might be sued likewise by the Name of Administrator, tho' this was a Doubt soon after the making that Law, for about † ten Years afterwards an Action of Debt was brought against an Administrator, who pleaded in Abatement that he ought to be charged as Executor, but the Writ was adjudged good, and yet about ‖ six Years afterwards the like Action was brought against an Administrator, and the Writ was abated because he was not sued as Executor, so that the Law was not yet settled as to his Matter.

† 38 Ed. 3. 20. 41 Ed. 3. 2. Fitz. Admin. 14. ‖ 48 Ed. 3. 21.

My Lord *Coke* likewise tells us, that before this Statute the Ordinary had a Property in the Intestate's Goods. *Secundum quid sed non simpliciter*, because he could not sell them, or release a Debt, or bring an Action to recover it, and

Hensloe's *Case*, 9 Rep. 38. 39.

and theſe he brings as Inſtances to prove that the Common Law gave him no abſolute Property in the Goods.

But as he was miſtaken in the cloſe Roll of *H.* 3. ſo (with Deference to his Opinion) he is not very conſiſtent in this, for having affirmed it to be a Cuſtom for the King to ſeize Inteſtate's Goods as *Parens Patriæ*, and that the Truſt and Care of them was afterwards committed to the Ordinaries, which he proves by a Conſtitution of Archbiſhop *Stratford*, *Anno* 4 *R.* 2. to what Purpoſe were thoſe Inſtances brought to prove that they had a Property in the Goods at *Common Law*, *ſecundùm quid*, when he acknowledges the Power which they originally had in ſuch Caſes, was given to them by an *Eccleſiaſtical Conſtitution?*

That which I ſhall obſerve upon this Statute is, (*viz.*) that the Ordinary was now bound to grant Adminiſtration, which he might eaſily be induced to do, becauſe it was for his Benefit, for it was to exempt him from many troubleſome and expenſive Suits, but he was no longer at Liberty to grant it to whom he pleaſed, but it muſt be to the next and moſt *lawful Friends* of the Inteſtate, that is, to the next of Kin who had done no unlawful Act for which they might be attainted, and if any Queſtion ſhould ariſe, Who thoſe Friends were? it was to be decided by the Common Law, according to the natural Order and Succeſſion, as uſed in that Law, that is, if there were Huſband and Wife, and one of them died Inteſtate, the Survivor was accompted the next and moſt *lawful Friend*, tho' many Years after, (*viz.*) *Anno* 3 *Car.* the Huſband ſurvived, and

John's *verſus* Row, Cro. Car. 106.

Adminiſtra-

Adminiſtration of his Wife's Eſtate was granted to her Niece, but upon the Appeal of the Huſband, it was ruled that Adminiſtration ought to be granted to him *De Jure.*

If there was neither Huſband or Wife, then Adminiſtration ought to be granted to the Sons and Daughters of the Inteſtate; and if none, then to the Children of ſuch Sons and Daughters, *&c.*

But whenever the Right of Adminiſtration happened to many who were in equal Degree, in ſuch Caſe the Ordinary was not bound to grant it to all, but to which he would, and they ſeldom failed to grant it to thoſe who were moſt in their Intereſt, that when they called them to an Accompt upon Pretence of beſtowing the Surplus (after Debts paid) for the Good of the Soul of the deceaſed, they might more eaſily retain ſome Part for themſelves.

Thus it continued for the Space of 170 Years and upwards, in all which Time the Widows of Inteſtates were often excluded, upon Pretence that they had no Right to adminiſter their Huſband's Goods; but *Anno* 21 *H.* 8. it was enacted, that *Adminiſtration ſhould be granted to the Widow or next of Kin of the Inteſtate, or to both, as the Ordinary ſhall think fit, taking Security for the true Adminiſtration of the Goods, and where diverſe Perſons claim the Adminiſtration as next of Kin*, in equal Degree, he may grant it to which he will. 21 H. 8. cap. 5.

By which Statute, as they had Authority to exclude the Wife, as was uſual before, ſo they had a clear and undoubted Power to grant Adminiſtration, either to her or to whom they pleaſed,

pleaſed, amongſt thoſe in equal Degree of Kindred to the Inteſtate; for ſo it was adjudged in Sir *George Sands*'s Caſe, before the making the Act of Diſtribution of Inteſtate's Eſtates, and ſo it was adjudged * afterwards.

Sir George Sands's Caſe, Raim. 93. Sid. 179. * Fortre *verſus* Fortre 1 Shore 351. † 5 Ed. 6.

But about † 22 Years after the making that Statute, 21 *H.* 8 there was a great Debate at *Doctors Commons* who ſhould be taken to be next of Kin; the Caſe was thus:

ff. The Duke of *Suffolk* had Iſſue a Daughter and Son by ſeveral Venters, and he diviſed his Goods to his Son, who died without Iſſue and Inteſtate, and Adminiſtration was granted to his Mother, but it was repealed and afterwards granted to the Siſter of the half Blood, for ſhe was adjudged to be the next of Kin to her Brother and not his own Mother:

And now, tho' the Ordinaries had a ſafe and large Juriſdiction by the ſeveral Statutes before-mentioned, yet they would ſtill be graſping after more; and therefore in the Bonds which they took as Securities *truly to Adminiſter*, they uſually inſerted this Clauſe, (*viz.*) *that after Debts paid the Surplus ſhould be diſtributed as they ſhould direct*, and this at firſt was thought very reaſonable, becauſe they directed the Diſtribution according to the Courſe of the Civil Law, with which our Law likewiſe agrees, (*viz.*) to the Wife, Children and next of Kin, in a natural Order and Succeſſion.

But when once they began to break that Order, then the Bonds with that Clauſe came to be conteſted; and I cannot find that any Thing was alledged to ſupport the *Clauſe*, but a bare Pretence that the *true Adminiſtration* mentioned in that Statute, extended as well

to

to the Distribution of the Surplus of the Intestate's Estate, as to the true Payment of his Debts.

But it seemed very unreasonable, that an Administrator should be at great Trouble and Expence to bring in and defend the Intestate's Estate, in order to satisfy his Debts; and when that was done, that the Ordinary should strip him of the Surplus, and dispose it where he pleased.

This was the Opinion of my Lord *Hobart* in *Slawney*'s Case, and that the Ordinary had no Power to impose any other Condition in those Bonds than † *truly to administer*; and that it was never intended by the Statute that the Administrator should have all the unprofitable Trouble and no Manner of Benefit; for certainly he was to have something as *solicitudinis suæ præmium*, and this appears by giving Preference to the Widow and next of Kin.

Slawney's *Case*, Hob. 83. Moor 864.

† Tooker *versus* Loan, Hob. 191. Stiles 456. Davis *versus* Matthew and Hill *versus* Bird.

The Case of *Tooker* is the first Instance we have of that Clause being contested, which happened *Anno* 14 *Jac.* and about five Years afterwards there was the like Debate in *Slawney*'s Case. Serjeant *Moor*, who likewise reports the Case, tells us, That it was not adjudged upon the first Debate being of great Consequence; and tho' all the Judges inclined to my Lord *Hobart*'s Opinion, yet, at the Request of the Judge of the Prerogative Court, it was referred to the Council, who argued against the Clause, and it doth not appear what became of it.

S. p. *See* Brierfley's *Case*. 1 Brown 31. S. p.

But about four Years afterwards it came to be a Question, Whether the Ordinary had any Manner of Power to compel an Administrator

Fotherbie's *Case*, Cro. Car. 62. Litt. Rep. 21.

to distribute the Surplus? and adjudged he had not; because he being obliged by the Statute 31 *Ed.* 3. to grant Administration, and that being done, he had executed his Power, and from that Time the Property of the Goods was vested in the Administrator.

The Ecclesiastical Courts would not be prohibited from the Exercise of this Power by one solemn Judgment of a Court in *Westminster*, but still Suits were brought in their Courts to compel Administrators to distribute the Surplus as they should direct, and this being controverted in *Levann's* Case, which happened about four Years after the other, it was once more solemnly adjudged, That after Administration granted, the Administrator had an absolute Interest in the Goods, and the Ordinary had nothing farther to do; for since the making that Statute, he cannot revoke an Administration at his Pleasure, as he might have done before, and therefore Administrators shall not be compelled to make Distribution by Suits in their Courts, nor could any Bond be put in Suit against them for that Purpose.

Levann's *Case*, Cro. Car. 201. W. Jones 228. *See tit. Ordinary. contra.* Sid. 179.

Matthew *versus* Davis, Stiles 456.

The like Judgment was given Anno 1654; there being a Suit in the Prerogative Court who should administer to the Goods of an Intestate, the Parties agreed, that one of them giving Bond to perform what the Court should decree, he should have the Administration, which was done accordingly; and afterwards the Court decreed, that he should make a *Distribution* in such a Manner; and for not performing this Decree, the other proceeded against him in the Prerogative Court by Way of Attachment; adjudg'd, that the Court would not make

make any Order or Decree for *Distribution* after the Bond given. *Stiles* 439, *Cook* versus *Chambers*.

But the Ordinaries being unwilling to part with that Jurisdiction which they had assumed in Cases of Distribution, tho' they had never any such Power by the Law, did afterwards make Use of that Liberty which they had by the Statute 21 *H.* 8. *viz.* to grant Administrations either to the Widow, or to the next of Kin, or to which of them they pleased, and their Method was to make a Computation how much the Surplus would amount to, and then to prefer him to the Administration, who would either pay the same, or give Bond to pay it to those to whom the Estate should be distributed by their Appointment. Hughes *versus* Hughes, 1 Lev. 233. Carter 125.

This Usage was attended with many Inconveniencies; for it was difficult for the Ordinaries to make a true and just Computation of the Intestate's Estate, to guide his Judgment in the Measure of Distribution; and it was as difficult for the Administrator to know what he had undertaken, before the true Value of such Estate was certainly known.

Therefore to remedy those Inconveniencies, a new Law was made *Anno* 22 *Car.* 2. tho' my Lord *North* tells us, the Civilians had some other Reasons why this Method should be altered, (*viz.*) it was a very dry and barren Jurisdiction to appoint Distributions in this Manner, because it was never attended with Suits or Appeals; or, as he observes, it could not be drawn out at length, for all Disputes were ended *uno flatu*: Because that before Administration was granted, an Agreement was made with all Parties concerned; so that afterwards there Raim. 499.

could be no Adverſary to contend the Accounts of the Adminiſtrator, becauſe none was left out of the Agreement, who could pretend a Right to any Share.

But be it for theſe or any other Reaſons, a Law was then made, and one would wonder that in ſo many Ages before, there was no certain and poſitive Law here to guide the Diſtribution of Inteſtates Eſtates, eſpecially ſince the Civil Law hath ſo wiſely provided in ſuch Caſes, in Reſpect to their Children; for if there were any ſuch, the Father or Mother ſurviving had the *Uſe* only, but the Children had the *Property* of the Goods; inſomuch, that if either of the ſurviving Parents married again, the Huſband was obliged by that Law to find good Security, to reſtore the ſame to the Children of the former Marriage.

Stat. 22. 23 Car. 2. cap. 10. Anno 1670.

This new Law was made *Anno* 22 & 23 *Car.* 2. by which another Method of Diſtribution was introduced; and becauſe this is the ſtanding Law relating to the ſettling Inteſtates Eſtates, I ſhall be the more particular in it, which is as followeth:

ſſ. *All Ordinaries having Power to grant Adminiſtration, ſhall take Bonds with Sureties in the Name of the Ordinary, with a Condition particularly mentioned in the Statute*; the Subſtance of which is, *to exhibit a true Inventory of the Goods, and truly to adminiſter the ſame according to Law, and to pay the Reſidue as the Ordinary ſhall direct, who hath Power to call the Adminiſtrator to accompt, and to order a Diſtribution of the Surplus after Debts, Funerals, and juſt Expences allowed, and to compel the*

Adminiſtrator

Adminiſtrator to obſerve and pay the ſame by the Eccleſiaſtical Laws.

After this Statute, an Action of Debt was brought upon Bond of 300*l.* wherein one *Brown* became bound to the Archbiſhop, that the Adminiſtrator of *J. M.* ſhould truly adminiſter and exhibit a true Inventory of the Inteſtate's Eſtate, and give a juſt Accompt of his Adminiſtration, and to pay the Surplus as the Judge of the Prerogative Court ſhould appoint. The Defendant pleaded, that the Adminiſtrator had exhibited a true Inventory, *&c.* and given a juſt Accompt, *&c.* The Plaintiff replied, that the Inteſtate was indebted to *W. R.* in 200*l.* by Bond, and that his Goods to that Value came to the Hands of the Adminiſtrator; and for Breach he aſſigns, that the Adminiſtrator *had not paid that Debt*; and upon Demurrer to this Plea, the Plaintiff had Judgment in *B. R.* but it was reverſed in the Exchequer Chamber, becauſe the Breach was not within the Intent and Meaning of the Condition of this Bond. *Lut.* 882. *Brown, verſus* Archbiſhop of *Canterbury*.

The ſame Caſe is reported by *Salkeld*; and there the Queſtion was, Whether an Adminiſtrator, by Virtue of this Bond, was obliged to give an Accompt before he was cited? And it was adjudged, that ſince a Perſon is entitled to a Diſtributive Part by the Statute, he may, in Conſequence, ſue for an Accompt, as a Legatee might; (for the *next of Kin* is a Legatee by the Statute) therefore as ſuch he ſhall have the ſame Remedy as a Legatee might before the Statute. Now the Condition of an Adminiſtrator's Bond to the Ordinary before the Statute,

was to *accompt when required*; therefore the Obligator was not bound to accompt before he was lawfully cited, and by Consequence could not be cited *ex officio*: But since the Statute, the Condition of the Bond is *to accompt at a certain Day*, therefore he must then accompt in Court at his Peril, and without any Citation; but then this Accompt is not examinable, unless a Party interested will controvert it; and the Words in the Condition, *(viz.) Well and truly to administer*, shall be construed in bringing in his Accompt, and not in paying the Debts of the Intestate; and therefore the Bond shall not be assigned or put in Execution, and a Breach assigned for Nonpayment of a Debt, or a Devastavit committed by the Administrator. 1 *Salk.* 315, Archbishop of *Canterbury* versus *Willis*.

The Distribution is to be thus:

ff. *One Third to the Wife of the Intestate, the Residue amongst his Children, and such as legally represent them, if any are dead. Other than such Children who shall have any Estate by Settlement of the Intestate in his Life-time, equal to the other Shares.*

But those Children who have been advanced by Settlements or Portions by the Intestate, not equal to the other Shares, shall have so much of the Surplus as will make all equal.

And the Heir at Law shall have an equal Share in the Distribution with the other Children, without any Consideration of what he had by Descent or otherwise from the Intestate.

If there are no Children, or legal Representatives of them, in such Case one Moiety shall be allotted to the Wife, the Residue equally to the next of Kin of

the

the Intestate in equal Degree, and those who legally represent them.

There shall be no Representation amongst collaterals after Brothers and Sisters Children.

And if there is no Wife, than all shall be distributed amongst the Children.

And if no Child, then to the next of Kin to the Intestate in equal Degree, and their Representatives.

No Distribution shall be made till a Year after the Intestate's Death, and every one to whom any Share shall be allotted, shall give Bond with Sureties in the Spiritual Court, that if Debts shall afterwards appear, to refund his rateable Part thereof, and of the Charges of the Administration.

But least any Thing in this Statute should be construed to extend to Femme Coverts who may die Intestate, therefore by the Statute 29 *Car.* 2. 'tis enacted, *That it shall not; but that their Husbands might have Administration to their personal Estates, as they had before.* 29 Car. 2. cap. 9.

The first of these Acts was only temporary, but by the Statute 1 *Jac.* 2. it was made perpetual, with this Addition, *That an Administrator shall not be cited to render an Accompt otherwise than by an Inventory, unless at the Instance of some Person in Behalf of a Minor, or having a Demand out of such Estate as Creditor, or next of Kin.* 1 Jac. 2. cap. 17.

And if after the Death of the Father any of the Children die Intestate without Wife or Children living, the Mother, every Brother and Sister, and their Representatives, shall have an equal Share with her.

There are several Things which may be observed upon this Statute, in Reference

(A) *To the Ordinary.*
(B) *To the Administrator.*
(C) *To the Distribution amongst Lineals.*
(D) *To the Distribution amongst Collaterals.*
(E) *To the Time of Distribution it self.*

(A) And first as to the Ordinary; the Law entrusted him before the making this Act to dispose the Surplus of the Intestate's Estate, which he might do by granting the Administration either to the Wife or to the next of Kin, and by Virtue thereof, the Surplus was vested in them; but now they are to pay it as the Ordinary shall sentence or decree, which is not to be discretionary, for 'tis to be guided by the true Intent and Meaning of the Act, which directs in what Manner, and to whom the Distribution shall be made.

(B) As to the Administrator, the Form of the Bond is likewise altered; for before, he was bound to distribute the Surplus as the Ordinary should direct, tho' that Clause in the Bond was controverted; 'tis true, he is bound in the like Manner now, but 'tis with this Limitation, That he is not to pay it, unless the Sentence of the Ordinary is pursuant to the Act, and then the Surplus is wholly given away from him; so that in this Respect it may be said, that the Statute makes the Intestate's Will, for the Administrator, *quatenus* such, is to have no Share of the personal Estate, but as he stands related to the Intestate, and this hath made a considerable Alteration in the Law; for before this

this Act, as the Administrator had the Burthen, so he had the Benefit of the Administration after the Debts were paid, for then the Surplus was his own, because no Man had a Right to call him to accompt.

(C) As to the Distribution amongst Lineals, I shall observe, that by the Civil Law the Children had certain Privileges in Respect to those Wills which concerned them; for where there were two Wills, and it did not appear which was the last, that was always adjudged to be the last which was most in Favour of the Children, and if written or subscribed by the Testator, or by his Order, it was good, tho' there were no Witnesses to prove it; but this is altered by this Statute where there is a Will, and a new Method of Distribution being now introduced where there is no Will, contrary to the Policy of former Laws, it hath been a Question whether this Statute ought not, for that Reason, to receive a strict and literal Interpretation in restraint of Distributions not clearly mentioned therein.

As for Instance, where there is but one Child, there can be no Distribution in the strict Sense of the Word, and that *Child* cannot be comprehended under the Word *Children* in the Act; so that this Case seems to be out of this Statute, and so it was adjudged by the chief Baron *Montague*, and the Court of Exchequer about 12 Years after it was made. Bunhill *versus* Newton, Anno 35 Car. 2.

ff. A Man died Intestate leaving one *Son*, who died likewise *Intestate*, Administration of his Goods was granted to the next of Kin of the Father, because there being but one Child, it was held, that the Statute could give no aid in such

ſuch Caſe, but the Son was to have the whole at Common Law.

In the very next Year the like Queſtion was debated in the King's-Bench between *Palmer* and *Allicock*, and in that Caſe Adminiſtration was granted to the next of Kin of the Child; and an Appeal was brought in the Arches by the next of Kin to the Father to revoke it, but he did not prevail; for they were of Opinion, that the Statute was introductory of a new Method as to *Diſtribution* only, but left the Right of Adminiſtration as it was before.

Palmer *verſus* Allicock, 3 Mod. 58.

'Tis true, by the Statute 21 *H.* 8. the *Child* had a Right to the Adminiſtration of his Father's perſonal Eſtate, but it was only a perſonal Right; ſo that if he had died before the Adminiſtration was granted, it was gone from his Executor or Adminiſtrator, and by Conſequence it muſt be granted to the next of Kin of the Father.

But ſince that Time it hath been adjudged, That by this new Statute a Right is veſted in the *Child*, (*viz.*) a Right to ſue for the Eſtate, and, by Conſequence, if he die before 'tis actually in his Poſſeſſion, it muſt go to his Adminiſtrator, and not to the Adminiſtrator of the Father.

This could not be a Doubt in the Caſe of a Will made by the Child, for then his Executor would have it; and ſince this Statute makes the Inteſtate's Will as to the Diſtribution of his Eſtate, it ought to be conſtrued as a Will.

And certainly the Parliament never intended to exclude the *Child*, if there ſhould be one and no more; for if an Intereſt in the Eſtate is not veſted

veſted in one, becauſe in Propriety of Speech it cannot be diſtributed to him, then this, amongſt many other Inconveniencies, would follow, (*viz.*) If a Father ſhould die Inteſtate, leaving one Son married, and that Son ſhould die Inteſtate, the Father's Eſtate muſt go to his next of Kin, which may be the Uncle to the Son, or to a more remote Relation, and his Wife ſhould have nothing.

The like Queſtion was made again in the King's Bench *Anno* 1 *Will.* 3. the Caſe was, a Man died Inteſtate leaving two Perſons, who were his next of Kin in equal Degree; one of them died within the Year, and before Diſtribution; and all the Court were ſo clear in Opinion, that an Intereſt was veſted in him, that one of the Judges wondered it ſhould ever have been made a Point; and he compared it to the Caſe of a *reſiduary Legatee* dying before probate of the Will, *viz.* his next of Kin ſhall have the Adminiſtration, and not the next of Kin of his Teſtator; ſo that the Law is now ſettled as to this Matter. Brown *verſus* Shore, 1 Shore 25.

(D) 'Tis natural for Men to provide for thoſe who lineally deſcend from them; and therefore in ſuch Deſcents the Civil Law, before the making this Statute, admitted Repreſentations in the moſt remote Degrees.

And becauſe thoſe who are very remote, have not ſo much of the Blood of the Anceſtor as thoſe who more immediately deſcended from him, therefore the Diſtribution in ſuch Caſes is to be made *per Stirpes*, and not *per Capita*.

But 'tis quite otherwiſe amongſt Collaterals; for they cannot be regarded as having any of the

the Inteſtate's Blood in them, but as they are his next of Kin, and upon a Suppoſition that he would have left his Eſtate to them if he had made a Will: And therefore Repreſentations have always been rejected amongſt Collaterals in remote Degrees; becauſe the Kindred may be branched into ſeveral Families, and amongſt ſo many Perſons, that the Eſtate would be divided into ſuch very ſmall Parts, that none would be the better for it.

Upon a *Mandamus* to the Biſhop to make Diſtribution according to the Statute, the Queſtion was, Whether the *Grandſon* of the Inteſtate's *Brother*, ſhould have a Share with the Daughter of the Inteſtate's Siſter? And adjudged, that he ſhould have no Share. 1 *Salk.* 230, *Pett* verſus *Pett.*

Therefore this Statute is penned according to the Rules of the Civil Law, and the Practice of the Eccleſiaſtical Courts, which is to reject all Manner of Repreſentatives amongſt Collaterals, after Brothers and Siſters Children, that is, the Children of the Brothers and Siſters *of the whole Blood* to the Inteſtate, and not of the half Blood, nor of any collateral Relations, for they were to have no Share in the Diſtribution.

And if there were no ſuch Children, then the Rule is, *vocantur ad Succeſſionem reliqui collaterales quicunq; in gradu ſunt proximiores, remotioribus Excluſis, ita quod infallibiliter ſemper prior in gradu ſit potior in Succeſſione.*

I muſt confeſs, that the Clauſe in this Statute prohibiting Repreſentations amongſt Collaterals after Brothers and Siſters Children, hath received

received another Conſtruction in the Caſe of *Crawley* and *Carter*, *viz.* That the *Brothers and Siſters* there meant, are the Brothers and Siſters of the Collaterals, and not of the Inteſtate himſelf; and therefore where a Man died Inteſtate, and his next of Kin were *two Aunts*, one of which was alſo dead in his Life-time, *but left Children*, and Adminiſtration being granted to the ſurviving Aunt, ſhe was decreed to diſtribute a Share to them *in loco Parentis*, and ſuch a Share as their Mother would have if ſhe had been living, which was contrary to the Opinion of my Lord Chief Juſtice *North*, who would not allow any Repreſentation amongſt Collaterals ſo remote.

Carter *verſus* Crawley, Raim. 496. 34 Car. 2. Anno 1683.

Much about the ſame Time was the Caſe of *Smith* and *Tracy* reported in ſeveral Books, *viz.* a Man died Inteſtate without Wife or Children, and the Queſtion was, Whether his Siſter of *the half Blood* ſhall have a diſtributive Part with the Brother of the whole Blood? And it was adjudged ſhe ſhould, becauſe the Statute made no Alteration in that Matter; and before the Statute, the Common Law made no Difference between the whole and the half † Blood.

Smith *verſus* Tracy, 1 Mod. 209. 2 Mod. 204. Jones 93. 1 Vent. 316. 2 Lev. 173. † Brown *verſus* Wood Allen 36. Stiles 174.

There are no Words in the Statute from which it can be inferr'd, that the Parliament intended any Difference in ſuch Caſes; for the Eſtate is to be divided *amongſt the next of Kin in equal Degree.* Now the half Blood may as properly be intended the next of Kin as the whole Blood; for tho' 'tis only the *Half*, yet 'tis the *ſame Blood* with the Whole, tho' not ſo much of it, and they are both Brother and Siſter to the Inteſtate, and ſo in equal Degree.

Anno

Watts *versus* Crooke, 2 Vent. 317. *Cases in Parliament* 108.

Anno 2 *Will'i*, 3. this Question was again debated upon an Appeal to the House of Lords, and their Decree was, That the half Blood shall have an equal Share with the whole; so that now the Law is settled by these solemn Resolutions as to this Point.

The Intestate died seised of a Messuage which he had *for three Lives*; the Administrator was sued in the Spiritual Court for a Distribution, and to exhibit an Inventory, which he did; but left out the Estate for Three Lives. The Question was, Whether this Estate was distributable, as the Intestate's Goods and Chattels, according to the Statute 22 & 23 *Car.* 2. and by Virtue of the Statute 29 *Car.* 2. *cap.* 3. and adjudged that it was not; for it remains a Freehold; notwithstanding, the Statute directs it to pay Debts, but not Legacies, unless expressly given out of it. 2 *Salk.* 464. *Oldham* versus *Pickering*.

(E) As to the Time of Distribution mentioned in the Statute, 'tis expressly provided, that it shall not be made till a Year is fully expired after the Intestate's Death; and this Clause was inserted for the Benefit of Creditors, that they might come in Time and claim their respective Debts, before any Distribution was made.

It is likewise for the Benefit of the Administrator himself; because in that Time he may be fully appriséd of the true Value of the Estate, and so by paying the Intestate's Debts in the first Place, may prevent a *Devastavit* against him, which might be occasioned by a hasty Distribution.

Acceptance of Executorship. See *Refusal.*

Actions

Actions by Administrator and Executor.

Under this Title I shall mention in the first Place,

(A) *The Form of the Declaration.*

(B) *The several Actions which an Executor or an Administrator may have for Things done, or omitted to be done in the Life of the Testator or Intestate.*

(C) *Actions on the Case brought against them, upon the simple Contract of the Testator or Intestate.*

(D) *Actio Personalis*, whether *moritur cum Persona.*

And first, as to the Form of the Declaration.

(A) THE old Books tell us, the Plaintiff must shew how he is Administrator, *viz.* That such a Person died Intestate, and that Administration was granted to him by the Ordinary. The Law was the same if the Action was brought *against an Administrator*; for even in such Case the Plaintiff was to shew by whom Administration was granted to the Defendant. 44 Ed. 3. 16. 35 H. 6. 31. Wade *versus* Atkinson, 2 Cro. 10.

But the Law is now altered as to that Matter; for where an * Administrator is Plaintiff, he must shew by whom Administration was granted to him, because 'tis that which entitles him to the Action; and if 'tis granted by a *Peculiar Jurisdiction*, he must not only shew *by whom*, but he must add this Clause, *Cui Commissio Administrationis predict. de jure pertinuit*, which he need not do, if the Administration was granted by a *Bishop*; for in such Case 'tis sufficient to say, that it was granted to him by the Bishop

* *See Title Ordinary, postea.*

Biſhop *loci iſtius ordinarium*; becauſe ſince the Law takes Notice of the general Juriſdiction of a Biſhop over the whole Diocele, it likewiſe takes Notice of all Acts done by Virtue of that Juriſdiction.

But where the Plaintiff ſues the Defendant *as Adminiſtrator*, he need not now ſet forth in his Declaration by whom Adminiſtration was committed, for it may not be in his Knowledge; and therefore, by the latter † Authorities, 'tis ſufficient for him to declare, That Adminiſtration was granted to the Defendant *Debita juris formâ*, without ſhewing by what Ordinary; and this is abſolutely neceſſary in order to charge him in the Action.

By the old Books the Plaintiff was likewiſe to ſhew in * *what Place* Adminiſtration was committed to him, which an Executor was not bound to do, becauſe a Man may be *Executor de ſon tort*; but this likewiſe is altered, for ‖ *Anno* 34 *Eliz.* it was adjudged, that he need not ſhew the *Place* where, *&c.* for 'tis well enough in a Declaration to ſay, that he is *Adminiſtrator*; but 'tis otherwiſe in a Plea in Bar, and ſo it is in a Plea in Abatement; as for Inſtance.

Indebitatus aſſumpſit & quantum meruit againſt an ** Executrix, who pleaded in Abatement, that her Huſband died Inteſtate; but did not ſay *in what Dioceſe*, and that he had *bona notabilia* in ſeveral Dioceſes, but did not ſay *where*; and that Adminiſtration was granted to her by the Prerogative Court; ſo that ſhe ought to be ſued as Adminiſtratrix and not as Executrix, and averred her Plea. The Plaintiff demurred ſpecially, and for Cauſe ſhewed, that the Defendant

He muſt ſhew by whom, otherwiſe 'tis naught upon a Demurrer, but not after a Verdict. Marſhall *verſus* Ledſham. Stiles 282. Cheeſborough *verſus* Lintot, Mich. 6 Will'i, B. R. S. P.

† T. Jones 1. Peto *verſus* Ruddock, Sid. 228. Ingram *verſus* Foſſet, Stiles 463 S. P. Knight *verſus* Webb, 1 Lutw. 301. S. P. Lit. Rep. 80. S. P. Bracton *verſus* Liſter, 2 Vent. 84. S. P.

* 35 H. 6. 31.

‖ Piers *verſus* Turner, Cro. Eliz. 283.

** Young *verſus Caſe*, Lut. 27.

fendant had pleaded an Administration without a *profert hic in Curiâ*, but the Plea was held ill, because the Defendant did not set forth in *what Diocese* her Husband died, nor *where* he had *bona notabilia*, that it might appear the Prerogative Administration was well granted; besides, she might possess the Goods as *Executor de son tort* before Administration granted to her; and tho' it may be true, that Administration was legally granted to her afterwards, yet that doth not purge the *Tort*; so is *Read*'s Case, and so is *Keble* and *Osbaston*'s Case. *See Title* Tort de Son.

Then he must conclude his Declaration with a *profert hic in Curiâ, &c.* and this was formerly held so essential, that it was adjudged to be Matter of Substance, and not to be cured by a Verdict, because it was the very Thing which entitled the Plaintiff to his Action, and this may be seen by the ‖ Authorities in the Margin.

‖ Edwards *versus* Stapleton, Cro. Eliz. 551, 592: Browning *versus* Fuller, 2 Cro. 299. 1 Bulst. 200. Cutts *versus* Bennett, 2 Cro. 409. 3 Bulst. 223. Cope *versus* Lewin, Hob. 38.

But the Law is now otherwise as to this Matter; for this is held to be only Form. My Lord * *Hales* was always of that Opinion; but 'tis probable, because of such different Judgments, it was thought convenient, amongst other Alterations made in the Law, to settle this by Act of † Parliament, *viz.* That *after a Verdict, the Judgment shall not be staid for not producing Letters of Administration.*

* 1 Vent. 222.

† 16 & 17 Car. 2. Cap. 8.

(B) *Of Actions for* Treſpaſſes *done to the Teſtator. The ſeveral Actions an Adminiſtrator or Executor may have for Things done in the* Life-time of the Teſtator.

ſſ. Before the Statute 4 *Ed.* 3. *Cap.* 7. an Executor could not have an Action of *Treſpaſs* for a Treſpaſs done to the Teſtator; but by that Statute he may have ſuch Action *for Goods and Chattels* carried away in his Life-time, and might recover Damages as the Teſtator himſelf might have done if he had been living.

But though an Executor could not have ſuch an Action at Common Law, yet he was not without a proper Remedy; for if the Goods were taken wrongfully from the Teſtator, he might replevie them, or might bring an Action of *Detinue*; but then the Goods muſt be in Being, becauſe in that Action the Thing it ſelf was to be recovered, which might well be, for the Property was never out of the Executor. He may have an Action of Debt upon the Statute 2 *Ed.* 6. againſt the Defendant, for not ſetting out Tythes in his Teſtator's Time; for tho' 'tis a *Tort* done to his Perſon, yet 'tis maintainable by the Equity of the Statute 4 *Ed.* 3.

1 Vent. 30. *Juſtice* Morton's *Caſe.*

One *Aldrich* made *Talbot* Executor, and died, leaving Iſſue an Infant, and one *Wolfe* as Adminiſtrator, *durante minore ætate*, of the Infant, brought an Action of Debt in the *C. B.* againſt the Defendant for 40 *l. de bonis Teſtatoris non Adminiſtrat.* by *Talbot nuper* Executor of *Aldrich. Et profert hic in Curia literas Teſtamentarias & literas Adminiſtratorias.* The Defendant pleaded that *Aldrich*

rich made *Talbot* Executor, who proved the Will, and made one *Roblett* his Executor, and died; and that *Roblett* ought to bring the Action. The Plaintiff replied, That *Talbot* did not prove the Will of *Aldrich*; and tho' *Roblett* had taken upon him the Executorship of *Talbot*, yet he had refused to intermeddle with the Goods of *Aldrich*; and upon a Demurrer to this Replication, the Plaintiff had Judgment; and upon a Writ of Error brought, it was objected, that the Replication was ill, because, when the Plaintiff in his Declaration, *profert hic in Curia literas Testamentarias*, that implies, that the Will of *Aldrich* was prov'd; therefore he cannot say in his Replication that it was not proved: But adjudged, this is only Matter of Form and impertinent, because the Plaintiff's Title is as Administrator, which is in Disaffirmance of the Probate of the Will. *Palm.* 153, *Hedon* versus *Wolfe.*

An Administrator, *during the Absence* of *W. R.* (who was Executor) brought an Action of Debt on a Bond, but did not *averr* in his Declaration that *W. R.* was absent; 'tis true, he need not *averr where* he was absent, for it shall be intended to be beyond Sea, but he must averr that he is absent. Adjudged that the Declaration is ill. 1 *Salk.* 42. *Slaughter* versus *May.*

The Plaintiff, as Administrator to a *Feme Covert*, brought an Action of Debt on a Bond, *&c.* The Defendant pleaded, that Administration of the Goods of the *Wife*, ought *de jure* to be granted to the Husband, who was then living, (*viz.*) at such a Place, *&c.* and upon a Demurrer to this Plea, it was adjudged ill, because till the *Aminiſtration is repealed*, the Plain-

tiff is rightful Adminiſtrator. 1 *Mod.* 231 *Davis* verſus *Cutts.*

Aſſumpſit brought by the Plaintiff as Adminiſtrator of *W. R.* wherein he ſets forth, That he had formerly left ſo much Money in the Hands of the Defendant for the Uſe of the ſaid Inteſtate *W. R.* and that in Conſideration thereof, he (the Defendant) promiſed to the Plaintiff to pay it to the Inteſtate, or if ſhe died before 18 Years of Age, then to pay it to her Executors or Adminiſtrators, *&c.* and ſhewed, that ſhe died before 18 Years old, and that he had not paid it to the Plaintiff as Adminiſtrator, *&c.* upon *non aſſumpſit* pleaded, the Plaintiff had a Verdict; and it was inſiſted in Arreſt of Judgment, that this Action ought to have been brought by the Plaintiff in his own Right, and not as Adminiſtrator, becauſe the Promiſe was made to him; but adjudged, that the naming himſelf Adminiſtrator was *Surpluſage:* 'Tis true he ſhould have *averred*, that the Defendant did not pay the Money to *W. R.* whilſt living; but this is cured by the *Verdict.* 1 *Vent.* 119. *Horneſey* verſus *Himmock.*

An Adminiſtrator got Judgment on a Bond of the Inteſtate, and afterwards he himſelf died Inteſtate, and Adminiſtration of his Goods was granted to *Paſchall*, who brought a *Scire Facias* upon this Judgment againſt the obligor; and upon *two Nihils* returned, had Judgment and Execution, and the Money brought into Court: It was moved, that it might be delivered to the Plaintiff *Paſchall*, which was done; for tho' the Execution ought not to have been executed, becauſe the firſt Adminiſtrator dying before it was executed, the Judgment became thereby

thereby ineffectual; yet it was good until reverſed by Writ of Error; and after it is reverſed, then, and not before, the Adminiſtrator of the Obligee may bring a new Action of Debt upon this Bond; and this Execution by *Paſchall*, the Adminiſtrator of the firſt Adminiſtrator, cannot be pleaded in Bar to it, becauſe the Judgment being ineffectual, the Execution muſt be ſo too. *Palm.* 443, *Paſchall* verſus *Ware*, *Latch.* 140. S. C.

Aſſumpſit by the Plaintiff as Adminiſtrator, *&c.* and he did not conclude his Declaration with a *profert hic in Curia literas Teſtamentarias*; and upon a Demurrer, *Hales*, Chief Juſtice, held this to be Matter of Form, and that the Declaration was perfect without it; 'tis true there are many Reſolutions to the contrary, but the latter Judgments are otherwiſe. 2 *Sand.* 402. *Slow* verſus *Willmott*. 4 & 5 *Anne* cap. 16.

As to the Recovery of Rents Arrear in the Life of the Teſtator.

At Common Law an Executor or Adminiſtrator of Perſons dying ſeiſed of Rents, which they held either in Fee or Fee-tail, or for Life, had no Remedy to recover the Arrears of ſuch Rents, which were due in the Life-time of their Teſtators; but now by the Statute 32 *H.* 8. an Action of Debt is given in ſuch Caſes, and the Executor may diſtrein. 32 *H.* 8. cap. 37.

But even after this Statute in ſome Caſes ſuch Executor cannot diſtrein; for if his Teſtator grant his Intereſt to another, and the Grantee had attorned, and then the Teſtator dies, his Executor cannot recover the Arrears of

Rent by Virtue of this Statute, becauſe they are loſt by the granting over his Eſtate, and were not due to the Teſtator at the Time of his Death; and the Statute is expreſs, that the Executor ſhall recover *in as large and ample Manner as the Teſtator might*, who, as this Caſe is, could not recover at all; and, by Conſequence, his Executor cannot recover ſuch Arrears: And ſo it was adjudged in *Andrew Ognell's* Caſe.

Ognell's *Caſe*, 4 Rep. 48.

But if a Man grant a Rent-Charge for Life out of his Land, and the Rent is Arrear, and afterwards he makes a Feoffment of thoſe Lands to *R. B.* and the Rent is likewiſe Arrear in his Time; and then *R. B.* makes another Feoffment to *W. N.* and the Rent is alſo Arrear in his Time, and the Grantee for Life of the Rent dieth, his Executor ſhall have an Action of Debt againſt every one of them, for the Rent which was in Arrear in their reſpective Times, the Reaſon is, *qui ſentit commodum ſentire debet & onus.*

Lilling-ſton's *Caſe*, 7 Rep. 39 *b.*

This Statute extends to Inheritances, or to a *Freehold for Life*; and therefore where a Rent was granted for a certain *Term of Years*, if the Grantee live ſo long, and 'tis Arrear in his Life-time, his Executor cannot diſtrein for the Rent after his Death, becauſe this Caſe is out of the Statute; for that provides a Remedy, only where the Teſtator died ſeiſed of the Rent either in *Fee*, *Tail*, or for *Life*; and 'tis not within the Equity of the Statute, though the Rent was determinable on Life.

Turner *verſus* Lee, Cro. Car. 471.

Laſtly, There are ſome Niceties in declaring in Debt for Rent, incurred in the Life-time of the Teſtator; for where it was *quod cum* (the Teſtator)

Teſtator) *dimiſiſſet, &c. reverſione inde* to the Plaintiff, this might be a Reverſion in Fee, and then the Rent doth not belong to the Executor, but to the Heir; he ſhould have declared, *quod cum* (the Teſtator) *poſſeſſionat, fuit* of a Term for Years, *&c.* and being ſo poſſeſſed, did demiſe the ſame; but the other was held good after a Verdict, though it would have been otherwiſe upon a Demurrer; for if it had not been a Reverſion of a Term, then it ſhall be intended, that upon *nil debet* pleaded, the Jury would have found for the Defendant.

Whether he is to be charged after the Aſſignment of his Intereſt.

There have been many Debates concerning the Charge upon Executors and Adminiſtrators, after the Aſſignment of their reſpective Rights.

And firſt concerning a Stock of Cattle, if a * Leaſe is made of them, or any other perſonal Thing, and the Leſſee *covenants* for himſelf and his Aſſigns, to deliver the Cattle or Goods at the End of the Term, in as good a Condition as he found them, or to pay ſo much Money, and afterwards the Leſſee aſſigns the Term and the Stock; the Aſſignee is not bound by this Covenant, becauſe 'tis a perſonal Contract between the Leſſor and the Leſſee, and there is no Privity between the Leſſor and the Aſſignee in Reſpect of the Reverſion; and therefore it binds only the Leſſee and his Executors or Adminiſtrators, becauſe they repreſent him; this is the third Reſolution in *Spencer's* Caſe.

*Spencer's Caſe, 5 Rep. 16, b.

Then as for Rent-Arrear after the Aſſignment of the Term, one of the firſt Caſes hap-

pened *Anno* 41 *Eliz.* and it was an *Action of Debt* againſt the Defendant, as Adminiſtrator for Rent-Arrear upon a Leaſe made to the Inteſtate, and incurred *after his Death.* The Adminiſtrator pleaded, that before the Rent became due, he *aſſigned the Term* to another; and that the Plaintiff, knowing the Aſſignment, had * *accepted the Rent* from the Aſſignee; and upon Demurrer to this Plea it was held, that the Adminiſtrator was not chargeable after the *Aſſignment:* But the Reaſon may be, becauſe he pleaded that the Plaintiff *had accepted the Rent of the Aſſignee*, which imports, that the Leſſor had accepted him to be his Tenant.

Marrow *verſus* Turpin, Cro. Eliz. 715. Moor 600. *cited in* Walker's *Caſe*, 3 Rep. 24. * Witchcott *verſus* Fox, 2 Cro. 398. 1 Rol. Rep. 389.

'Tis true, two Years before, a † *Prebendary* made a Leaſe tendering Rent, the Leſſee died, *his Executor aſſigned the Term*, the *Prebendary* reſigned, and a new one was made, who brought an Action of Debt againſt the *Executor of the Leſſee*, for Rent due and incurred *after the Aſſignment*, and adjudged, that it did not lie; for the Executor would have been chargeable, not upon a Privity of Contract, but upon a Privity in Law, as having the Eſtate if he had not aſſigned the Term; but by the Aſſignment, the Privity of Eſtate was removed, and therefore the Action would not lie againſt him.

† Overton *verſus* Syddall, Cro. Eliz. 555. Poph. 120. Golds 120. Co. Entr. 122.

But Mr. *Noy* ſaid, this Caſe was never adjudged, for *Popham and Fenner* were always againſt it; beſides, the Leſſor being a *Prebendary*, which is a ſingle Corporation, the perſonal Contract was determined by his Death, and would not go to his Succeſſor, for 'tis good for no longer than his Life, becauſe he cannot make a Leaſe for a longer Term. And laſtly, it was brought in the *Debet* and *Detinet*, by the ſucceeding

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ſucceeding Prebendary, upon a Leaſe made by his Predeceſſor; and in ſuch Caſe an Aſſignment would be a Bar to the Action.

'Tis to be obſerved in the Caſe of *Overton* and *Syddal*, That the *Executor of the Leſſee* aſſigned the Term; but that if the *Leſſee himſelf* had aſſigned it, the Privity of Contract would have ſtill remained, though the Privity of Eſtate was removed by his own Act; and notwithſtanding his Aſſignment, he ſhall be always chargeable to the Leſſor for Rent due and incurred, as well after the Aſſignment, as before; that is, he ſhall be chargeable *during his Life*; for if he die, his Executors ſhall not be liable for any Rent due afterwards, becauſe by his Death the perſonal Privity of Contract, as to the *Action of Debt*, is determined: And this my Lord *Coke* tells us, was reſolved by the whole Court in the aforeſaid Caſe of *Overton* and *Syddal*.

Walker verſus Harris, Moor 352. 3 Rep. 24. 3 Rep. 24. a.

'Tis true, Juſtice *Croke*, in *Marrow* and *Turpine*'s Caſe, tells us, That the Reſolution in *Walker*'s Caſe is not Law, *viz.* that the *Leſſee himſelf* is not chargeable with the Rent after the Aſſignment of the Term. He gives no Reaſon for it; but 'tis probable it may be becauſe the Contract between the Leſſor and the Leſſee to pay the Rent, is a real Contract, and annexed to the Eſtate, and therefore follows the Land out of which the Rent is to iſſue, and doth not concern the Perſon of the Leſſee, but in reſpect of the Eſtate which he hath in that Land; when he hath parted with that Eſtate which ſavoured of the Realty, it goes away with the Land to which it was annexed.

But

But it hath been otherwiſe adjudged of late; *viz.* that the Privity of Contract doth not only remain between the Leſſor and Leſſee during the Life of the Leſſee, and after he hath *aſſigned* the Term, but continues after his Death between the Leſſor and the Adminiſtrator of the Leſſee; for in *Helier verſus Caſbard*'s Caſe, an Action of Debt was brought by the Leſſor againſt the Adminiſtrator of the Leſſee, who pleaded, that before the Rent became due, he aſſigned the Term to another, and upon Demurrer, the Plaintiff had Judgment; for it was adjudged, that the Privity of Contract ſtill remained between the Leſſor and the Adminiſtrator of the Leſſee, and he ſhall be charged upon that Contract of his Inteſtate in an Action of Debt in the *Detinet*, ſo far as he hath Aſſets, and this after the Aſſignment of the Term.

Helier *verſus* Caſbard, Sid. 266. 1 Lev. 127. 2 Vent. 209.

And ſo it was adjudged *Anno* 3 *Will'i*, *viz.* an Action of Debt in the *Detinet* was brought againſt the Defendant as Adminiſtratrix to her Huſband; ſhe pleaded, That after Adminiſtration granted, and before any Rent became due, ſhe *aſſigned* her Eſtate and Intereſt to another, who entered, and was poſſeſſed, and that the Plaintiff *had Notice of the Aſſignment* before the Action brought; and upon Demurrer it was adjudged for the Plaintiff, becauſe the Action being brought in the *Detinet*, the Aſſignment is no good Plea; for the Adminiſtratrix is chargeable upon the Contract of the Inteſtate, and liable as far as ſhe hath Aſſets.

Coghill *verſus* Freelove, 2 Vent. 209. 3 Mod. 325.

There is no Difference between this Caſe, and that of *Helier* and *Caſbard*; but only in this Caſe the Defendant pleaded, That the Plaintiff

Plaintiff had *Notice of the Aſſignment* before the Action brought; and 'tis to be obſerved, That all thoſe Actions were brought againſt *Executors and Adminiſtrators* of Leſſees for Years, after they had aſſigned their Intereſt.

But about the ſame Time that this laſt Caſe happened, *viz Anno* 2 *Will'i*, the Remedy to recover Rent reſerved upon a Leaſe, was extended a little farther; for the Action was brought by the Leſſor *againſt the Aſſignee* of the Executrix of the Leſſee. And Serjeant *Levintz* tells us, it was an Action of *Debt for Rent*; but in that he was miſtaken, for it was an *Action of Covenant* brought againſt the Defendant *Tovey* as *Aſſignee* of *Suſanna Gill*, who was *Executrix* of *Richard Gill* the Leſſee. The Defendant pleaded, That before the Rent became due, he aſſigned all his Intereſt in the Term to one *James Mott*, who, by Virtue thereof, entered, and was ſtill poſſeſſed. And upon Demurrer to this Plea, two Judges of the *Common-Pleas* were of Opinion, That becauſe the Defendant had not pleaded that the Plaintiff had Notice of this Aſſignment, or that he had accepted the Rent from *Mott*, it was not a perfect and abſolute Aſſignment to deſtroy the *Privity of Eſtate*, which was between the Leſſor and the *Aſſignee*; but that notwithſtanding ſuch Aſſignment, he ſtill continued Tenant as to the Payment of the Rent, and muſt continue ſo until the Plaintiff had *Notice* of the Aſſignment; but upon a Writ of Error brought, the Judgment in the *Common-Pleas* was reverſed, becauſe the Privity of Contract being gone by the Aſſignment *of the Executor* himſelf before any Rent due; and the Privity of Eſtate being likewiſe gone, by the

Pitcher *verſus* Tovey 3 Lev. 295. 2 Vent. 234. 4 Mod. 71. 1 Shore 340. 1 Salk. 81.

the Assignment of the Assignee of the Executor, nothing remained to support this Action.

(C) *Of* Actions on the Case *brought against them upon the simple Contract of the Testator or Intestate.*

Action against the Administrator; and the Plaintiff did not set forth that Administration was granted to the Defendant, adjudged an incurable Fault; for tho' the Plaintiff need not shew by whom it was granted, yet 'tis absolutely necessary to set forth that it was granted to him, that he may be charged in an Action. 2 Vent. 84. *Bracton* versus *Lister*.

It hath been a Question, Whether *an Action on the Case* would lie against an Executor upon the simple Contract of the Testator? And in *Norwood* and *Read*'s Case, *Anno* 4 & 5 *Phil. & Mar.* it was adjudged, that such Action would lie.

Norwood *versus* Read, Plow, Com. 181.

But the Law was not settled by that Judgment, for * *Anno* 44 *Eliz.* there was a very solemn and contrary Resolution, *viz.* the Chief Justice † *Popham* declared it to be the Opinion of all the Judges in *England*, that an *Action on the Case* would not lie against an Executor, for a Debt due upon a simple Contract of the Testator.

* Slade *versus* Morley, Yel. 20. 4 Rep. 93.

† *Because there were different Opinions as to this Matter,* Poph. *said he would make an Exchequer Chamber Case.* Golds 154. Pine *versus* Hide.

About nine Years before that Time, there was a Distinction made between a Promise of the Testator to pay a certain Sum of Money, and his Promise to do any collateral Act; that in the first Case an *Action of Debt* did lie against the Executor, because where the Sum was

was certain, the Promiſe to pay it made it a Duty.

But there are other Opinions, that an *Indebitatus Aſſumpſit* will not lie againſt the Executor, for a Debt created by the ſimple Contract of the Teſtator, becauſe the Teſtator himſelf might have waged his Law, if ſuch Action had been brought againſt him; for where the *Demand is certain*, as 'tis always in an Action of Debt, there the Defendant may wage his Law, which he cannot do *in an Action on the Caſe*, for theſe are *Actiones injuriarum & contra pacem*, and the Damages to be recovered for a Breach of Promiſe, are always uncertain, 'till made otherwiſe by a Verdict; and therefore the Defendant cannot wage his Law, becauſe 'tis impoſſible for him to make Oath that he hath paid, when he cannot tell what is due.

15 Ed. 4. 16, 25. Stubbings *verſus* Rotheram, Cro. Eliz. 454. Serle *verſus* Rolfe, Cro. Eliz. 459, 557. 1 And 182.

Debt againſt an Executor upon an Award made againſt his Teſtator, adjudged that the Action would not lie, becauſe the Teſtator might have waged his Law. *Cro. Eliz.* 557. *Hampton* verſus *Boyer*.

I admit that in *Slade*'s Caſe before mentioned, as reported by my Lord *Coke*, it was held, that *an Action of Debt*, and likewiſe an *Action on the Caſe*, would lie againſt an Executor for a Debt due upon a ſimple Contract of the Teſtator, and that the Plaintiff might have either of theſe Actions at his Election; and the Reaſon given why he might have *an Action on the Caſe* was, That every Contract executory, implies a Promiſe; for when a Man *agrees* to pay Money, or to deliver a Thing, he *promiſes* to pay or to deliver it; this my Lord *Vaughan* calls a falſe Gloſs, purpoſely invented to turn *Actions of*

Vaugh. Rep. 101.

Debt

Debt into *Actions on the Case*, to whose Opinion I must oppose the Reasons of my Lord *Coke*, and of six other Judges in *Pinchion*'s Case, (*viz.*) It cannot be denied but that after the Death of the Testator, the Debt or Duty still remains, and 'tis generally agreed, That an *Action of Debt* would not lie against an Executor upon the simple Contract of the Testator, because in that Action the Testator might have waged his Law; and 'tis a Rule, that the Executor shall never be charged where the Testator might have waged his Law.

Pinchion's *Case*, 2 Cro. 293. 9 Rep. 86.

Now if an *Action on the Case* should not lie against him, then the Creditor would be without any Manner of Remedy, which would be an apparent Defect in the Law, and for that Reason the Judges in *Pinchion*'s Case held, That every Contract executory implied a Promise, upon which an *Action on the Case* might be founded; and that in such Action, the Testator, if he had been living, could not have waged his Law; therefore it follows, that his Executor shall be charged in that Action, otherwise the Law would be deficient.

The Case of *Pinchion* before mentioned was adjudged in the King's-Bench in the very next Year after *Kercher*'s Case, *viz.* That an *Action on the Case* would lie, and it was afterwards affirmed in the *Exchequer Chamber* upon a Writ of Error; and 'tis probable, that because there were Variety of Opinions before that Time, my Lord *Coke* bid the Students observe. That it was then adjudged by all the Judges of *England*.

And about 11 Years afterwards, the Distinction was denied between a Promise of the Testator

Teſtator to pay a certain Sum of Money, and his Promiſe to do a collateral Act; and it was adjudged, that there was no Difference between thoſe Promiſes as to an *Action on the Caſe* to be brought againſt the Executor, but that in either Caſe the Action was maintainable. Fawcett *verſus* Carter, 2 Cro. 662. Jones 16. Palm. 329.

The ſame Point was adjudged ſeven Years before in the ſame Court; and that Judgment was likewiſe affirmed in the *Exchequer-Chamber*, where the Judges were all of the ſame Opinion, That there was no Difference between a Promiſe to pay a Debt certain, and a Promiſe to do a collateral Act, which was uncertain, and reſted only in Damages, if the Promiſe was broken in the Life-time of the Teſtator; for in both Caſes his Executor ſhall be charged in an *Action on the Caſe*. Sanders *verſus* Eſterlie, 1 Roll. Rep. 266.

And here it may not be improper to mention the Statute of Frauds, made *Anno* 29. *Car.* 2. *cap.* 3. I mean that Paragraph by which 'tis enacted, That *no Action ſhall be brought to charge an Executor or Adminiſtrator upon a ſpecial Promiſe to anſwer Damages out of his own Eſtate, or to charge the Defendant, upon any Promiſe, to anſwer for the Debt or Miſcarriage of another, &c. unleſs the Agreement upon which the Action is brought is put into Writing, or ſome Memorandum, or Note thereof, and ſigned by the Party to be charged therewith, or by ſome other Perſon authorized by him.* 29 Car. 2. cap. 3.

In a ſpecial Verdict the Caſe was, Leſſee for Years died, leaving Rent in Arrear; his Widow promiſed the Leſſor, that in Conſideration he would permit her to enjoy the Lands till *Lady-Day*, and to remove ſeveral Goods, *&c.* ſhe would pay the Rent Arrear in the Life-

time

time of her Husband, which was 160*l.* as also 200*l.* more. The Question was, since there was no *Memorandum* of this Matter in Writing, Whether the promise was good or no? For the Statute 29 *Car.* 2. *expressly enacts, That no Action shall be brought to charge an Executor or Administrator on any special Promise to answer out of his own Estate, or upon any Promise to answer for the Debt, Default, or Miscarriage of another, unless the Agreement, or some Memorandum thereof, be put in Writing.* Now it was insisted for the Plaintiff, that tho' the Promise might be void, as to the Payment of the 160*l.* (which she had actually paid) because that was the Debt of her Husband, and not put into Writing, yet it was good as to the 200*l.* because it was upon a good Consideration, and for her proper Debt: But adjudged, that the Promise being void in Part, 'tis void in the whole, because this is an entire Agreement, and the Action is brought for both Sums, and could not be brought otherwise, without varying from the Promise it self. 2 *Vent.* 223. Lord *Lexington* versus *Clerke.*

Error to reverse a Judgment in an inferior Court, against an Error wherein the Plaintiff declared upon a *mutuasset* by the Testator. The Error was, That Debt would not lie against an Executor upon a simple Contract of his Testator; besides, *mutuasset* properly signifies to lend; so that the Testator did lend, and not borrow the Money: It should have been *mutuatus esset*; but adjudged, that 'tis too late to object this Matter after Judgment, and *mutuasset* may be as well expounded to borrow as to lend. 1 *Vent.* 109. *Adams* versus *Guy*, 2 *Sand.* 291. S. C.

Having

Having given this Account of *Actions on the Caſe* brought againſt Adminiſtrators and Executors upon the *ſimple Contract* of the Teſtators, I ſhall mention ſomething of Actions of *Debt* brought againſt them. *Actions of Debt.*

There are many Inſtances in our Books of ſuch *Actions of Debt* brought againſt Executors; and tho' 'tis generally held, that they are not to be maintained, yet the Defendants may be charged, or not, according as they plead; for if the Defendant *Demurs* to ſuch Declaration *in Debt*, the Action muſt be abated; but if he plead to it, and 'tis found againſt him, then he hath loſt the Benefit of the Law. Hughs *verſus* Robotham, Poph. 31. Cro. Eliz. 302.

Sometime afterwards it was held, That notwithſtanding ſuch Plea, and tho' 'tis found againſt the Defendant, yet the Judges ought to abate the Writ *ex Officio*.

For *Anno* 31 *Eliz.* an *Action of Debt* was brought againſt an Adminiſtrator upon a *ſimple Contract* of the Inteſtate, the Defendant pleaded *plene adminiſtravit*, and it was found againſt him, yet the Plaintiff could not have Judgment, becauſe an Action *of Debt* would not lie againſt an Executor at Common Law upon a ſimple Contract of his Teſtator, and where the Action is improper, and not ſufficient to charge the Defendant, the Court *ex officio* ought to abate the Writ: And ſo are the Caſes in the old Books, tho' not very clear, the Law being ſtill doubtful in this Point. Hughſon *verſus* Webb, Cro. Eliz. 121. 1 And. 182. 1 Leon 165. Golds 106. Bro. Exor. plito 80.

For about five Years after the Judgment in *Hughſon*'s Caſe, the like *Action of Debt* was brought againſt an Executor, who pleaded *ne unques* Executor, and it was found againſt him; Germin *verſus* Rolls, Cro. Eliz. 425. Moor 366.

and in that Case the Plaintiff had Judgment, because the Defendant by his Plea did admit there was such a Contract, and therefore 'tis reasonable he should be charged with it, but Serjeant *Moor*, who reports the same Case, tells us, That *Norwood*'s Case was denied to be Law, and that tho' the Executor had pleaded, and did not take any Advantage by a Demurrer to the Declaration, yet the Court perceiving that an *Action of Debt* would not lie against him, they ought to give Judgment against the Plaintiff *ex Officio*.

Morgan *versus* Green, Cro. Car. 187. Jones Rep. 223. Palmer *versus* Lawson, Sid. 332.

But now the Law is settled as to this Matter, (*viz.*) That if the Defendant demur to such Declaration, he must have Judgment; but if he will plead to it, then he hath taken Notice of the Debt, and hath in a Manner confessed it, especially if he plead *plene Administravit*; and in such Case, if 'tis found against him, the Plaintiff shall have Judgment.

Actions of Covenant.

Covenants are distinguished into express Covenants, in which the Executor himself is named, and into Covenants in Law, wherein he is not named; but in both Cases 'tis held, that he is liable to the Action of Covenant;

† Howse *versus* Webster, Yel. 103.

†and an Action of Debt may be brought against him for Rent Arrear after the Death of the Lessee, tho' he never enter into the Land, because he represents the Person of the Testator.

‖ Newton *versus* Osborne, Stiles 387. ** Porter *versus* Swetnam, Stiles 406.

‖ It hath been a Question, Whether the Words *Yielding and Paying*, &c. make an express *Covenant*, or a Covenant in Law? For those Words are seemingly the Words of the Lessor, and not of the Lessee, but by Construction of Law; but it was ** adjudged, That those

thoſe Words made an *expreſs Covenant*; for they comprehended the Agreement of both Parties; and that there was no Difference between an expreſs Covenant, and a Covenant in Law, eſpecially when it related to Payment of Rent, or to any Thing which ariſeth out of the Land.

But the Executor is bound by the perſonal Covenant of the Teſtator, which doth not relate to the Payment of Rent, and wherein he was never named, as for Inſtance: *ſſ.* The Teſtator covenanted to teach an Apprentice his Trade, and then died; an Action of Covenant was brought againſt his Executor, and it was inſiſted, after a Verdict for the Plaintiff, that this was a perſonal Covenant of the Teſtator, and did not bind his Executor, but only himſelf during his Life; but adjudged, That it likewiſe bound his Executor; for he ought to ſee the Apprentice ſhould be taught his Trade, and if he was not of that Trade himſelf, to aſſign him to another that was. Walker *verſus* Hull, 1 Lev. 177.

Now as to expreſs Covenants of the Teſtator which *run with the Land*, the Executor is always chargeable with them, even after the Aſſignment of the Term, and after the Acceptance of the Rent by the Leſſor or his Aſſigns, *viz.* the Leſſee for Years covenanted to *Repair*, *&c.* the Leſſor aſſigned the Reverſion, and the Leſſee aſſigned the Term, and the *Aſſignee of the Reverſion* brought an Action of Covenant againſt the Executor of the Leſſee for a Breach of Covenant after the Aſſignment of the Term, adjudged that it lay, it being upon an expreſs Covenant, which runs with the Land, by which the Covenantor himſelf, Brett *verſus* Cumberland, 2 Cro. 521. 2 Roll. Rep. 63.

But not the Assignee of an Executor, after he had assigned the Term, and so it was held in Pitcher *and* Tovey's *Case*, 1 Salk. 81. *32 H. 8. cap. 34.

and his Executors likewise, are always made liable to answer it, so long as they have *any Assets*; not by Reason of any Privity of Contract, but by the Covenant it self, and by Virtue of the Statute 32 *H.* 8. *which gives the Assignee of a Reversion the same Benefit and Advantage by Action against the Executors of the Lessee, for not performing the Covenants contained in the Lease, as the Lessors themselves might have had and enjoyed, if no such Assignment had been made*; and this was to remedy a Defect in the Common Law; for before that Time an Assignee of a Reversion could not have that Benefit, because he was neither Party or Privy to the Covenant.

A. and *B.* covenanted on the one Part, and *H.* on the other Part, and it was agreed, that *H.* enter into a Bond to pay 100 *l.* to *B.* who died, and his Administrator brought an Action of Covenant against *H.* for non Payment of the 100 *l.* to *B.* in his Life-time; it was adjudged, that the Action would not lye because he was not Party to the Indenture; but it ought to be brought by *A. Telv.* 177. *Rolls* versus *Yates.*

Batchelour *versus* Gage, Cro. Car. 188. Jones 223.

But an Executor is bound by the express Covenant of his Testator, tho' 'tis collateral and not for *Payment of Rent* or for *Repairing*, (*viz.*) the Lessee covenanted for himself, his Executors and Assigns, not to erect any Building on the Land to the Prejudice of the Lessor, and afterwards the Lessee *assigned the Term* and died, the Lessor *accepted* the Rent of the *Assignee*, and notwithstanding that Acceptance, brought an Action of Covenant against the *Executor* of the Lessee; it was objected that this Action would not lie, because by the Assignment of the

the Term, and the Acceptance of the Rent, the Privity of Contract was determined; but adjudged, That neither the one or the other ſhall bar the Leſſor from an Action againſt an *Executor* of the Leſſee upon his expreſs Covenant made in his Life-time.

Anno 1 *Will'i* 3. this Action was extended a little farther; for the Law being ſettled, That it would lie againſt the *Executor himſelf* upon an *expreſs Covenant* of the *Teſtator*, it was then brought againſt the *Aſſignee of ſuch Executor*: The Caſe was thus:

Ff. The Biſhop of *Winton* made a Leaſe to *W. N.* for 21 Years, and died; the Leſſee *aſſigned the Term*, and the *Aſſignee* made his *Executor* and died; then the Executor of the ſucceeding Biſhop brought an Action of Covenant againſt the *Executor of the Aſſignee*, who was Executor of the Leſſee, and laid the Breach for not *repairing in the Life-time of the ſaid ſucceeding Biſhop*; and adjudged, that he was entitled to the Action, tho' the Covenant was made with the preceding Biſhop, and tho' it was againſt the Executor of the Aſſignee, which ſaid Aſſignee was Executor to the Leſſee as aforeſaid. Morley *verſus* Polhill, 2 Vent. 56.

Actio perſonalis, whether moritur cum Perſonâ.

(D) 'Tis often mentioned in our Books, That *actio perſonalis moritur cum perſonâ*; now as to this Matter it is to be conſidered, that there are ſeveral Sorts of perſonal Actions, (*viz.*) ſome which ariſe *ex contractu*, others, *quaſi ex contractu*, and ſome which ariſe *ex maleficio*; now moſt Actions which ariſe by Contract, as Debt, Covenant, &c. an Executor might maintain *See Tit. Eſcape, and Tit. Pleas by Executors.*

tain at Common Law *after the Death* of his Teſtator, for theſe are Actions which ſurvive: 'tis true, an Action of *Accompt* may be, and is uſually upon a *Contract*, but an Executor could not have that Action for an Accompt to be made to his Teſtator before the Statute *Weſt.* 2. *cap.* 23. for Want of Privity; he might likewiſe have Actions which relate to a Contract, but not Actions which ariſe *ex maleficio*, as Treſpaſs *Vi & armis*, Battery, *&c.* for a Treſpaſs or Battery done to his Teſtator; and therefore, where an Executor brought an *Action on the Caſe* for an Eſcape upon *meſne Proceſs* committed in the Life-time of his Teſtator, the Court was divided, whether ſuch Action could be maintained, becauſe it was grounded upon the Tort of the Officer, who ſuffered the Eſcape, it was agreed, That if the Party had been in *Execution*, and eſcaped, the Executor might have the Action, becauſe by ſuch Eſcape the Sheriff is become Debtor; but being committed upon *meſne Proceſs*, the Action is not given to the Executor by the Statute *Ed.* 3. becauſe that provides a Remedy only by Action of Treſpaſs, where the *Goods or Chattels* of the Teſtator are carried away in his Life-time, and not for any Thing which ariſes *ex maleficio*; but two Judges were of Opinion, that tho' this was a Tort in the Life-time of the Teſtator, yet it was not done to his *Perſon*, but to his *Eſtate*; and for that Reaſon the Action would lie by his Executor, and that by the Equity of the Statute 4 *Ed.* 3. *de bonis aſportatis in vita Teſtatoris.*

Maſon verſus Dixon, Jones 173. Poph. 189. Latch 167. Cro. Ja. 419. Poph. 192. Pruby verſus Mayne.

4 Ed. 3. cap. 7.

And with this ſome late Reſolutions do agree, (*viz.*) a Sheriff made a falſe Retorn in the Life-time of the Teſtator, (*viz.*) that he levied

Williams verſus Carey, 1 Salk. 12. 4 Mod. 403.

levied only so much, when, in Truth, he had actually levied more; the Executor brought an Action on the Case for this false Return, and adjudged that it lay; for this was not an Injury done to the *Person* of the Testator, for then *moritur cum persona*, but it was an Injury to his Estate.

The Distinction seems to be as reasonable where the Injury is done by the *Testator*, as where 'tis done *to him*; for if 'tis done *by him* to the Estate of another, his Executor in Justice ought to be charged as far as he hath Assets; and so it was decreed by my Lord Chancellor *Finch*, *Anno* 28 *Car.* 2. even against an Executor of an Executor, who had wasted the Goods of the first Testator, even before any Statute was made for that Purpose. 2 Ch. Rep. 217. *Sir Brian Tuck's Case*, 8 Leon. 341. *contra.*

'Tis so likewise by the Spiritual Law, for if a Parson or Vicar suffer the Buildings which he hath in Right of the Church to be in decay, his Executor is liable to Dilapidations.

I admit the old Books are, That if the Testator commit a Trespass, either upon the Person, Goods, or *Lands* of another, and dies, no Action lies against his Executor, tho' he hath Assets, because *actio personalis moritur cum persona*, which is true, where the Injury is done to his Person, but not to his Goods or Estate, as aforesaid. Tooley *versus* Windham, Cro. Eliz. 206.

'Tis also true, that where the Testator had a Judgment, and a *Fi. fa.* by Virtue whereof the Sheriff levied the Debt, *but did not return the Writ*, or pay the Money; this was held to be a personal Wrong done to him, for which his Executor could have no *Action on the Case* against the Sheriff; and my Lord *Rolls* tells us, Spurslow *versus* Prince, Cro. Car. 297. Roll Abr. 913.

That tho' the Plaintiff had a Verdict, yet he consented that it should be set aside for his own Expedition, to bring a new Action; but he would have done well to have told us what Action it must be, since Justice *Croke* in the same Case tells us, That he could have no Action on the Case, either at Common Law, or by Virtue of the Statute, 4 *Ed.* 3.

Now certainly the not returning the Writ, and not paying the Money to the Testator, is no more an Injury done to his Person, than making a false Return in his Life-time; and that hath been adjudged not to be a personal Wrong, but an Injury to his Estate, as it appears by a late Judgment before recited.

But the Judges in former Days being not willing to break thro' this Rule to come at Justice, have left us very nice Distinctions to support the Action of an Executor, as well where the Escape was upon *mesne Process* in the Life-time of the Testator, as where the Sheriff levied Money upon an Execution, and did not pay it; for in the first Case, tho' they would not allow that the Executor should have an *Action on the Case*, where the Escape was upon *mesne Process* in the Life-time of the Testator, yet if that *mesne Process* was for *Debt*, and the Party escaped, then the Executor might have an Action on the Case, because that Action shall be taken to be of the same Nature with the original Action of Debt, and so within the Equity of the Statute, 4 *Ed.* 3.

Stratin *versus* Farmer, 1 Roll. Abr. 912.

My Lord *Rolls*, who reports this Case, tells us *dubitatur*, and well it might, for 'tis scarce intelligible; for let the Ground of the Action be

be what it will, 'tis the Escape which makes the Offence, and that must be the same, where 'tis after a Commitment, upon a *mesne Process*.

Then where the Sheriff levies Money upon an Execution, and doth not pay it to the Testator in his Life-time, tho' his Executor could not have an *Action on the Case* against the Sheriff, as it was ruled in *Spurstow*'s Case; yet about seven Years afterwards it was adjudged, that he might have an *Action of Debt*, not only against the Sheriff, but against his Executor, because it was not grounded *ex maleficio*, but upon a Contract in Law upon Receipt of the Money, which creates a Debt by Implication of Law, and therefore an Action lies against his Executor.

Packman *versus* Culliford, 1 Roll. Abr. 921. *Reported by the Name of* Perkinson *versus* Gilford, Cro. Car. 539. Jones 430. March. 13.

Now 'tis plain by this Case, that by levying the Money, the Sheriff is become Debtor to the Testator; and 'tis as plain, that his not paying it to him, is an Injury done to his Estate, and not to his Person, and by Consequence, if the Sheriff die before 'tis paid, his Executor or Administrator is liable to an Action of *Debt*, tho' not to an Action of *Trespass on the Case*.

Of Administration, to whom grantable.

THE Method of granting Administration of Intestate's Estates, is in this Manner:

(1.) *To the Husband or Wife.*
(2.) *To the Sons or Daughters.*

(3.) *To*

(3.) *To the Father or Mother.*
(4.) *To the Brother or Sister of the whole Blood.*
If none,
(5.) *To the Brother or Sister of half Blood.*
(6.) *To the Uncle or Aunt.*
(7.) *To the great Uncle, and Brother's Grandchildren in a Parity, because they are in equal Degree.*
(8.) *To the next of Kin, tho' more remote.*

And if there are no Kindred, then the Ordinary may grant Letters *ad colligendum bona, &c.* or Letters of Administration to a Creditor, or to a Stranger, subject to a Revocation by the next of Kin, if any such appear.

Prohibition to the Spiritual Court, upon a Suggestion, that they refused to grant Administration to the *next of Kin*, but to another; the Prohibition was denied, because they are Judges who is the next of Kin. *Palm.* 416, *Mayhoe* versus *Stempling. Lutw.* 67. S. C.

(1.) Administrations to the Kindred have been disputed in the several Cases following, *viz.*

1. *To the Father, where the Son dies Intestate.*
2. *To the Husband of the Wife.*
3. *To the half Blood with the whole.*
4. *To the Neice where there is a Nephew.*

(2.) Administrations granted to those who are not of Kin, have been disputed when granted, *viz.*

1. *To*

1. *To Aliens.*
2. *To Legatees.*
3. *To an Executor of an Executor.*
4. *Several Adminiſtrations of one Thing.*

Of all theſe Adminiſtrations I ſhall treat diſtinctly, as I find them reported in our Books.

(1.) To the Father. And firſt of Adminiſtrations granted to the *Father* where the Son dies Inteſtate, it ſeems to be very clear that the Father hath a Right to the Adminiſtration; but as clear as it is, it hath been queſtioned whether the Mother is of Kin to her Child, as I ſhall ſhew hereafter in its proper Place; and that where Children have died Inteſtate, Adminiſtration hath been granted to the Siſter of the half Blood, rather than to the Mother: But this was contrary both to the Civil Law, and our Law; for the Father and Mother are certainly the next of Kin in the aſcending Line to their Children, and by the Civil Law they ſucceed equally, but by our Law the Father hath the Right of Adminiſtration; and if after his Death any of his Children die Inteſtate without Wife or Children, the Mother hath the Right, but then ſhe is to have but an equal Share with the reſt of her Children.

(2.) To the Huſband of the Wife. Adminiſtration of the Goods of the Wife ought to be granted to the Huſband, and this *De jure*, againſt the Opinion of Juſtice *Croke*, who held, That of Right it did not belong to him; but that it was in the Power of the Ordinary to grant it

Johns *verſus* Rowe, Cro. Car. 106. Jones 175.

to

to him, or to the *Kindred of the Wife*, and that no Appeal lies if 'tis not granted to the Huſband, becauſe 'tis meerly at the Diſcretion of the Ordinary.

And according to this Opinion, Adminiſtrations have been granted from the Huſband to the next of Kin of the Wife, tho' wrongfully, *viz.* the Daughter married, and died, and Adminiſtration was granted to her Mother, the Huſband ſued to have it repealed, and the Mother moved for a Prohibition; but it was denied, becauſe it ought to be granted to the Huſband. Sid. 409.

Adminiſtration of the Inteſtate's Eſtate was granted to his Wife, and an Appeal was brought by his Mother, for that the Wife had covenanted ſhe would not intermeddle, ſhe being well provided for otherwiſe. It was inſiſted, that this fell incidently into the principal Matter of which the Spiritual Court had Cognizance, and that 'tis uncertain whether the Delegates would admit this Allegation or not, and there is no Inſtance of a Prohibition granted *quia timet*, but a Prohibition was granted *quoad* this Allegation. 1 *Vent.* 313. *Baker* verſus *Baker.*

Huſband and Wife as Adminiſtratrix brought an Action of Debt againſt *W. R.* in which they declared, that the *Inteſtate was Adminiſtrator* to *M. G.* who lent the Money to the Defendant. 'Tis true Judgment was given for the Plaintiffs, but it was reverſed on a Writ of Error, becauſe the Action was brought by an Adminiſtratrix of an Adminiſtrator, when the Adminiſtration of the firſt Inteſtate's Eſtate ought to have

have been granted to the next of Kin. *Goulds b.* 182. *Thorne's* Caſe.

Prohibition was granted, for that the Spiritual Court would have granted Adminiſtration of the Goods of the Wife to her Brother, when her Huſband was living, to whom of Right it belonged. *Palm.* 521. *Dixes* Caſe.

(3.) To the half Blood. And for Adminiſtrations granted to the half Blood, where there are ſome of the whole Blood, having already mentioned ſeveral Caſes ſince the Statute, wherein it hath been adjudged, That they have an equal Right with the whole, I ſhall only take Notice of one Caſe where it was ſo adjudged before the Statute, by which it may appear, that the Common Law made no Difference between them, (*viz.*) the Siſter of the half Blood was married, Adminiſtration was granted to her Huſband and to her jointly by the Prerogative Court; and the Brother of the whole Blood ſued in that Court to have the Adminiſtration repealed; and upon a Prohibition it was adjudged, That they were in equal Degree to the Inteſtate, and within the Meaning of the Statute 21 *H.* 8. and therefore the Ordinary having executed his Power according to the Statute, he cannot afterwards repeal ſuch Adminiſtration lawfully granted.

Brown *verſus* Wood, Allen 36. Stiles 74.

But becauſe the Huſband, who was not of Kin to the Inteſtate, was joined with the Wife in this Adminiſtration, for that Reaſon the Ordinary had not obſerved the Statute, and this Inconvenience might enſue, (*viz.*) if the Huſband ſurvived the Wife, he would be entitled to the whole, and the Kindred of the Inteſtate would

would have nothing, therefore a Prohibition was granted.

(4.) To the Nephew or Niece. The *Nephew* and *Neice* are in equal Degree to the Intestate; but where the *Neice* had got Administration, the *Nephew* libelled in the Spiritual Court to *repeal* it, or to have Distribution of the Estate, and the *Neice* moved for a Prohibition, which was granted *quoad* the Distribution, as reported by *Stiles*, but very imperfectly, and so 'tis by Mr. *Allen*, who tells us, there was an Agreement between the Parties to distribute the Estate; but the *Neice* having got Administration refused to distribute, and thereupon a Suit was in the Spiritual Court suggesting this Agreement; but a Prohibition was granted, because when the Ordinary hath executed his Power according to the Statute, as he had done by granting the Administration to the *Neice*, he cannot afterwards alter it, or compel the Administrator to make Distribution, notwithstanding the Agreement.

Hill *versus* Bird, Stiles 102. Allen 56.

See Repeal plito. 4.

The Testator made two Executors, and they both died in his Life-time; then the Testator died, having *two Sisters*, and the eldest got Administration, and the youngest moved for a Prohibition to repeal it, because she being in equal Degree, ought to have an equal Share; but it was denied, because if the Administration was not duly granted, she might bring an Appeal. *Stiles* 147. *Brown* versus *Poynes*.

Now as to Administrations to those who are not of Kin to the Intestate, it hath been a Question whether it could be granted, or not.

1. To

1. To *an Alien*, and adjudged that it may, tho' the Inteſtate's Eſtate conſiſted in Leaſes for Years and other perſonal Things, becauſe the Adminiſtrator hath them not in his own Right, but in the Right of another. Sir Upwell Caroon's *Caſe*, Cro. Car. 8.

2. To *Legatees*, (*viz.*) ſometimes Adminiſtrations are granted to them; now if ſuch Adminiſtration doth afterwards happen to be repealed upon a bare *Citation*, in ſuch Caſe the Legatee may retain his Legacy; but 'tis otherwiſe upon an *Appeal*, becauſe there the Adminiſtration is avoided *ab initio*. 1 Vent. 219.

And ſometimes a *Reſiduary Legatee* hath prevailed even againſt the *next of Kin*, (*viz.*) the Teſtator deviſed 2000 *l.* to his Daughter, and after his Debts paid, he deviſed the *Reſidue* of his Goods to *his Wife*, and made another Perſon Executor, and died; that Executor died Inteſtate, and thereupon the Daughter of the Teſtator got Adminiſtration; ſome Years afterwards the Widow, who was the *reſiduary Legatee*, ſues to have that Adminiſtration repealed; and upon a Motion for a Prohibition, ſuggeſting that there was no *reſiduum*, the Court enclined not to grant it, but that Adminiſtration ought to be granted to the *reſiduary Legatee*. 'Tis true, the Statute requires it ſhould be granted to the *next of Kin*, which was the *Daughter* in this Caſe, but 'tis upon Preſumption that the Inteſtate himſelf would have preferred him; but that cannot be preſumed here, becauſe the *Reſidue* was given to another; and therefore it will be to no Purpoſe to grant the Adminiſtration to the *next of Kin*, when ſhe can have no Benefit by it, and 'tis reaſonable that Thomas *verſus* Butler, 1 Vent. 217. 2 Lev. 55.

that she should have the Care of the Estate to whom the Residue was given.

W. R. died Intestate, without Child or Kindred; the Plaintiff got *Letters Patents*, and Administration was granted to him, which is the usual Course in such Cases. The Defendant entered *Caveats*, by which the Plaintiff being put to great Charges, brought his Action against the Defendant; and upon a Demurrer to the Declaration, it was adjudged, That till Administration granted, the Property of the Goods was in the Ordinary; and that the Plaintiff had neither *jus in re*, or *ad Rem*; that the Appointment by *Letters Patents* was but a Recommendation to the Bishop; and that the granting Administration to the *Patentee*, was rather in Respect to the King, then of Right; for notwithstanding the Opinion in *Hensloe*'s Case, Administrations originally belonged to the Bishop, and the Instances of Lords of Mannors granting them, is not a Proof to the contrary. 1 *Salk.* 37. *Manning* versus *Knop.*

(3.) It ought not to be granted to an *Executor of an Executor*, where the first Executor dies before probate; for if so, then it must be granted to the next of Kin of the first Testator *cum Testamento annexo*, unless where the first Executor was also *residuary Legatee*; for then he is in *loco haredis*, and in such Case, tho' he die before probate, or afterwards, his Executor hath the Right of Administration; but if the *Residue* is given to another, then the Person to whom 'tis so given hath the Right, and this is the constant Practice of the Prerogative Court; as Dr. *Drury*, who was long since Judge thereof, informed the Judges.

Isted *versus* Stanley, Dyer 372.

So

So if the first *Executor* dies *Inteſtate* before *probate* of his Teſtator's Will, the Adminiſtration of his Goods ought to be granted to his *next of Kin*, I mean of the Teſtator's Goods, becauſe in ſuch Caſe he is dead Inteſtate; but if the Executor had proved the Will, and then died Inteſtate, the Ordinary may grant Adminiſtration of his Goods, and that Adminiſtrator might adminiſter the Goods of the firſt Teſtator.

But if an Adminiſtrator makes an Executor, and dies, his Executor ſhall not have the Adminiſtration of the Goods of the Adminiſtrator, but the Ordinary ought to grant a new Adminiſtration.

Adminiſtration ought not to be granted to a Popiſh Recuſant Convict, nor a Probate of any Will, becauſe they are diſabled by the Statute *Eliz. cap.* 4. and therefore where the Spiritual Court would have granted an Adminiſtration to ſuch a Recuſant, a Prohibition was granted. Ride *verſus* Ride, Mod. *Caſes* 239.

(4.) *Laſtly*, Several Adminiſtrations cannot be granted of an entire Thing; as if the Inteſtate hath a Bond of 500*l.* and the Ordinary grants Adminiſtration of 100*l.* to one, and of the Remainder to another, 'tis void: Neither can he grant ſeveral Adminiſtrations of Goods in one County to one, and of Goods in another County to another. Hamon *verſus* More, Sid. 100.

Debt by an Adminiſtrator, to whom Adminiſtration was committed by *T. C.* Maſter of Arts, *Commiſſary or Official of a peculiar legetime fulcit*; upon Demurrer to this Declaration it was objected, that the Court could not take Notice that every *peculiar* had a Right to grant

Adminiſtration, therefore the Plaintiff ſhould have ſet forth by what Power, *(viz.) Cui de jure commiſſio Adminiſtrationis in hac parte pertinet:* But adjudged, That every Peculiar hath a Power of granting Adminiſtration; for they have a ſpecial Ordinary for that Purpoſe. 'Tis true, he who grants Adminiſtration, having a Power ſo to do by Commiſſion, his Authority muſt be averred. Thus, where 'tis alledged to be granted by *T. R. Theologiæ Profeſſorem*, or *Diaconum*, or *Chancellarium* of *&c.* there the Plaintiff muſt averr, *cui de jure, &c.* becauſe all thoſe have Authority only by Commiſſion; but where 'tis granted *Virtute officii*, it need not be averred; therefore where 'tis alledged to be granted by the Abbot of *Weſtminſter loci iſtius ordinarium*, or by a *Commiſſary* of the Biſhop of, *&c.* or by the *Official* of a Biſhop, *&c.* or by an *Archdeacon*, 'tis good, without averring their Authority; becauſe the Words *Ordinary*, *Commiſſary*, *Official*, *Archdeacon*, *&c.* imply ſuch a Power.

Denham *verſus* Stevenſon, 1 Salk. 40.

The Adminiſtrator of *T. R.* brought Debt on a Bond of 40 *l.* and alledged, that Adminiſtration of all the Goods of *T. R. not exceeding* 40 *l.* was granted to him by *Dr.* Cartwright, *Dean, Rural of* Frodſham, *within the Dioceſe of* Cheſter, who had a peculiar Juriſdiction, *&c.* The Defendant pleads, That the Inteſtate *T. R.* had Goods above the Value of 40 *l. (viz.)* of the *Value of* 50 *l.* at *Frodſham within the Dioceſe of Cheſter*; and that the *Official of the Biſhop of Cheſter* had granted Adminiſtration, *&c.* to *W. R.* and traverſed that the *Dean Rurall* had any Authority, *&c.* and upon a Demurrer to this Plea, it was held ill, becauſe the Defendant

dant did not alledge, that *Frodſham was within the Peculiar*, but only *within the Dioceſe of Cheſter*. Now if it was within the Peculiar, then the Dean Rural might grant Adminiſtration, where the Value did not exceed 40 *l.* and if it doth exceed that Value, either within or without the Peculiar, then the Biſhop may grant Adminiſtration, and both may ſtand. O'Kell *verſus* Ludlow, 5 Mod. 423

Covenant againſt Huſband and Wife Adminiſtratrix of her firſt Huſband, upon a Leaſe made to him, wherein he covenanted *not to aſſign without Leave of the Leſſor*, and the Breach was, that he did aſſign without Leave, *&c.* ſo that the Inteſtate in his Life did break his Covenant, and the Defendant *dum ſola* likewiſe after his Deceaſe, *to whom Adminiſtration of her Huſband's Goods was committed*, and likewiſe the Huſband and Wife, after their Marriage, did break this Covenant; upon Demurrer it was objected, that the Plaintiff ought to ſhew *by whom Adminiſtration was committed to the Widow, and by what Authority*; which is very true, if the Adminiſtratrix had been Plaintiff; but where ſhe is Defendant, 'tis unreaſonable that the Plaintiff ſhould ſhew by what Authority it was granted, he being a Stranger to her Proceedings. Knight *verſus* Green, 1 Lutw.

Debt by an Adminiſtrator, the Declaration concluded, (*viz.*) to whom Adminiſtration was granted by the Archbiſhop of *Canterbury*, *apud Caſtrum Eborum*, *&c.* upon *non eſt factum* pleaded, The Plaintiff had a Verdict. It was moved in Arreſt of Judgment, that the granting Adminiſtration is a judicial Act, and it appearing by this Declaration, that it was granted

Boſwell & Rawſtern's *Caſe*, 1 Lutw.

by the Archbiſhop of *Canterbury out of his Province*, 'tis therefore void; But adjudged that 'tis only a miniſterial Act, for the Ordinary is directed by the Statute to grant it.

Hilliard *verſus* Cox, 1 Salk. 37.

Debt by an Adminiſtrator, ſetting forth, that Adminiſtration was granted to him by the Biſhop of *L.* The Defendant pleaded in Bar, that the Inteſtate, at the Time of his Death, was Reſident in *H.* in another Dioceſe, and upon Demurrer, this was adjudged a good Plea.

1 Lev. 78.

Ruled by three Judges, that where a Man dies Inteſtate, having Goods *in ſeveral Peculiars*, that in ſuch, the granting Adminiſtration is in the Metropolitan, and not in the Ordinary.

Adminiſtration, what Acts amount to it.

ACTS which amount to an *Adminiſtration*, are ſuch which relate to the *Claiming* or *Releaſing* any Debt due to the Inteſtate, or *poſſeſſing* and *converting* any of his Goods, of all which we have ſome Inſtances in the Year Books.

11 H. 4. 83. 8 H. 6. 35.

ſſ. Where a Man made an *Executor*, and he *releaſed* a Debt due to the Teſtator, this was held to be an Adminiſtration.

* Stokes *verſus* Porter, Moor Rep. 14. 1 And. 11.

* So likewiſe where he *receives* a Debt due to the Teſtator, the Law is the ſame, eſpecially if he gives an Acquittance for it.

† 1 Roll. Abr. 917.

† A *Poſſeſſion* and *Converſion* to his own Uſe will certainly make an Adminiſtration, but there have been Doubts made as to the *bare Poſſeſſion*

Poſſeſſion only; for *Anno* 21 *H.* 6. it was held, That ſuch a *Poſſeſſion*, without diſpoſing the Goods, would not amount to an Adminiſtration, as if a Stranger lends an Horſe from the Stable of the Inteſtate as his own. 21 H. 6. 27.

And for a late Authority to this Purpoſe this Caſe happened. *ſſ.* An Executor before *probate* poſſeſſed himſelf of all the Teſtator's Goods, and cauſed them to be appraiſed and inventoried, then he *paid a Debt*, and *converted* ſome to his own Uſe, and afterwards refuſed, before the Ordinary, to prove the Will, whereupon Adminiſtration was granted to the Widow of the Deceaſed, and he delivered the Reſidue of the Goods to her; and in Action of Debt brought againſt him, it was adjudged, That he ſhall be charged for the whole perſonal Eſtate, becauſe he had adminiſtered, and his Refuſal after Adminiſtration ſignifies nothing; beſides, the granting Adminiſtration to the Wife was void, when a rightful Executor had adminiſtred, and the delivering the Reſidue of Goods to her will not diſcharge him, becauſe he being once reſponſible by poſſeſſing himſelf of them, his delivering them afterwards to one who had no Right to receive them, cannot diſcharge him. Porter *verſus* Bilden, 1 Mod. 213.

If an Executor is appointed *ad colligendum Bona defunct, &c.* this is not an Adminiſtration, ſo as to charge the Perſon to whom it was committed; but if he farther give him Authority to ſell *bona peritura*, and he ſells Goods accordingly, in ſuch Caſe, if an Action is brought againſt him as Executor, he cannot plead that he adminiſtred by Virtue of ſuch Letter, *ad colligendum Bona, &c.* without traverſing, That he adminiſtred as Executor; for when he poſ- 10 H. 7. 27. Kilw. 81.

ſame Right which ſuch an Adminiſtrator had whilſt living; but that Right is extended no farther, and this appears by the Caſe following:

2 Vent. 362. *Jſ.* The Executor of a Cognizee of a Statute died Inteſtate, and Adminiſtration, *de Bonis non, &c.* of the *Cognizee* was granted to another, who agreed with the Cognizor to aſſign the Statute for a Sum of Money, then the Adminiſtrator *de Bonis non, &c.* died, and it was decreed, that his Executor ſhould have the Money, tho' before the Statute was extended, it could not be *aſſigned* by Law.

But in ſome Caſes the Adminiſtrator himſelf *de Bonis non, &c.* cannot recover when he doth not rightly entitle himſelf to the Action. As where an Adminiſtrator mortgaged a Term for Years which he had of the Inteſtate, and then made *R. B.* his Executor, and died; after whoſe Death *W. N.* got Adminiſtration *de Bonis non, &c.* of the Inteſtate, and claimed the reſiduary Intereſt and Benefit of Redemption; but decreed, that the Executor of the firſt Adminiſtrator ſhall have it, becauſe that Adminiſtrator had not the Term in *auter Droit*, but in his *own Right*, to whom he was entitled by Virtue of the Adminiſtration, otherwiſe he could not have a Title to mortgage it, and therefore the Adminiſtrator, *de Bonis non*, had no Title.

Butler *verſus* Bernard, 1 Ch. Rep. 224.

Ley *verſus* Anderton, Stiles 225. So where the Obligee made his Wife Executrix, and died, the Executrix afterwards died Inteſtate, and *R. B.* took out Adminiſtration to her, and then brought an Action of Debt upon the Bond, as Adminiſtrator to the Executrix, and had Judgment; but it was reverſed upon a

Writ

Writ of Error, becauſe he ought to have taken out Adminiſtration *de Bonis non*, *&c.* of her Huſband who was the Teſtator, and then to have brought his Action as ſuch.

And as the *Plaintiff* is to entitle himſelf to the Action, ſo there have been Queſtions concerning the *Defendant*, (*viz.*) againſt whom the *Plaintiff* ſhould bring the Action, as for Inſtance:

The Executrix of an Executor was an Infant, and Adminiſtration of the Goods of the Executor was granted to one *Ford*, *durante minore ætate* of the Infant; and then an Action was brought againſt him as ſuch an Adminiſtrator, it was objected, That it ought to be againſt him as Adminiſtrator of the Goods of the firſt Teſtator not adminiſtred by his Executor; but adjudged well enough, becauſe the granting the Adminiſtration takes in the Goods of both. Norton *verſus* Molineux, Hob. 246.

The Huſband was poſſeſſed of a Term for Years in the Right of his Wife; and by his Will he deviſed to her all the Reſidue of the ſaid Term, and made her Executrix, and died; ſhe *entered generally* on the Land, and declared, *That her Huſband had given her all which he had*; afterwards ſhe died Inteſtate; adjudged, that by her general Entry ſhe had the Term as Executrix at firſt; but ſince there were neither Debts or Legacies to be paid, ſhe ſhall have it as a Legatee; for by her Declaration, that her Huſband had given her all, ſhe did agree to take it as a Legacy, and therefore her Adminiſtrator ſhall have it, and not the Adminiſtrator *de Bonis non* of her Huſband. 2 Brownl. 132. Hellam *verſus* Lee, 7 Jac. C. B. Rot. 2718.

By

17 Car. 2. cap. 28. By a late Statute 'tis enacted, That where a Judgment after *Verdict* ſhall be had by an Executor or Adminiſtrator, the *Adminiſtrator de Bonis non, &c.* may ſue out a *Sci. fa.* and take out Execution on ſuch Judgment, but not on a Judgment by *Confeſſion* or *Nil dicit.*

Annuity.

THIS is a yearly Rent payable to the Grantee for a certain Term of Years, or for Life, or in Fee, and chargeth only the Grantor and his Heirs ſo long as they have Aſſets by Deſcent.

It differs from a *Rent-Charge*; for that always Iſſues out of *Land*; it differs likewiſe in the Method of Recovery, for not only an Action of Debt, but a Writ of Annuity, lies againſt the Grantor or his Heirs; beſides, it is never taken to be real Aſſets, becauſe it charges only the Perſon, and is no Freehold in Law, and therefore cannot be taken in Execution upon a *Statute* or an *Elegit*, as a *Rent-Charge* may.

Where an *Annuity* was granted, and the Rent was Arrear, the Grantee may have an Action of of Debt, and ſo may his Executor after his Death, for the Reaſon before mentioned, becauſe 'tis a Charge upon the Perſon of the Grantor.

4 Rep. 48. *b.* 'Tis otherwiſe where a Rent-Charge is granted in Arrear; for if the Grantee dies, his Executors or Adminiſtrators had no Remedy at Common Law to recover thoſe Arrears, neither could his Heir *diſtrein* for the ſame; therefore by the Statute 32 *H.* 8. *an Action of Debt* is given

32 H. 8. cap. 37.

given to the Executor for ſuch Arrears, which muſt be brought againſt the Tenant, who ought to pay the Rent, or againſt his Executors or Adminiſtrators.

They may likewiſe *diſtrein* upon the Land for the Rent Arrear, ſo long as ſuch Land which is chargeable with the Rent continue in the Poſſeſſion of the Tenant, or any other Perſon claiming under him; and therefore in Avowry for Rent, the Plaintiff muſt ſet forth, that the Lands remain in the Seiſin of the Tenant who ought to pay it, or in the Hand of ſome other who claims under him by Purchaſe or Deſcent, becauſe the Words of the Statute which gives him this Remedy ought to be purſued. *Myles verſus Willoughby, Cro. Eliz. 547.*

Having mentioned that an Annuity may be granted for Years, and what Remedy an Executor hath for the Arrears incurr'd in the Life-time of the Grantee, I ſhall now recite one Caſe of a Deviſe of Rent.

ff. The Teſtator being poſſeſſed of a Term for Years in two Houſes, deviſed them both to his Wife during the *whole Term, if ſhe lived ſo long unmarried*; and if ſhe married, then he deviſed only his Dwelling-Houſe to her for the Remainder of the Term which ſhould be then to come, and 20 *l. per Annum* out of the other Houſe, without ſaying for *how long*, and deviſed the Houſe it ſelf to another, paying the Rent, the Widow married again, the Rent was Arrear. The firſt Queſtion was, Whether this Rent was extinguiſhed in the Term, by the Unity of Poſſeſſion both of the Rent and the Term? And adjudged it was not, as Serjeant *Rolls* reports it; for though ſhe had the whole Term once as Executrix, yet this Rent which ariſes upon *Gough verſus Howard, 3 Bulſt. 121. 1 Roll. Rep. 368. 1 Roll. Abr. 610. Bridgm. 52*

upon a Contingency, *viz.* upon her marrying, is not extinguiſhed thereby.

The next Queſtion was, If the Rent was not extinguiſhed then, whether ſhe ſhall be entitled to it during the Remainder of the Term, (for the Will doth not mention how long ſhe ſhall have it) or whether 'tis determined by her Death? And as to this Point the Court was divided, though the Reaſons of my Lord *Coke* and Juſtice *Doderidge* ſeem to be clear, That ſhe ſhall have it during the Term; for if the Teſtator hath a Term for Years in *an Houſe*, and he deviſes the *Houſe* to *R. B.* without limiting what Eſtate he ſhall have in it, the Deviſee ſhall have the whole Term abſolutely, and not only for ſo long as he ſhall live.

Now here is a Deviſe of the whole Term abſolutely in one of the Houſes by the firſt Clauſe of the Will, and there being a Dependency of the laſt Clauſe upon the firſt, 'tis reaſonable it ſhould be expounded by the firſt, *viz.* That ſhe ſhall have the Rent for the whole Term.

Appeals.

THIS is a Term uſed in our Law as well as in the Civil Law, to ſignify the Removal of a Cauſe from an inferior to a ſuperior Court; and becauſe in former Days the *Pope* was held to be the ſupreme Head of the Church, therefore Appeals to him were frequent, till prohibited by the Statute 24 *H.* 8. by which Statute the ancient Right of the Crown was aſſumed; and from thenceforth Appeals were allowed.

24 H. 8. cap. 12.

I. *From*

I. *From the Archdeacon or his Official to the Bishop of the Diocese, or to his Commissary.*

II. *From the Commissary to the Dean of the Arches, and from him to the Archbishop of the Province, whose Determination shall be final.*

These Appeals must be in Causes *Testamentary*, or *Matrimonial*, in *Divorces*, *Rights of Tythes*, *Oblations*, and *Obventions*, and it must be brought within fifteen Days after Sentence given; all this is required by the aforesaid Statute.

In the next Year some Alteration was made, *viz.* That *Appeals* from the *Archbishop* shall be made to the *King in Chancery*; and in such Case the *Lord Keeper* is to issue out a Commission under the Great Seal to certain Persons, *from whose Sentence there shall be no farther Appeal*, and this is called a *Court of Delegates*. 25 H. 8. Cap. 19.

And yet notwithstanding those restrictive Words, the King frequently grants *Commissions of Review*, even after Sentence given by the *Delegates*. And my Lord *Coke* tells us, 'tis his Prerogative so to do, which he maintained when he was *Attorney General*; but I believe he maintained it upon better Reasons than he gives us in his 4*th Institutes*; for there he tells us, the *King* may grant *Commissions of Review*, because the *Pope* could do it by Virtue of the Canon Law, and what he might do by Usurpation, the King may do by Virtue of a legal Right vested in the Crown. 4 Inst. 340.

This is what the *Logicians* call *fallacia consequentis*; for it doth not follow, that because the *Pope* exercised a Power by *Usurpation*, therefore the *King* may *lawfully* use the like Power.

It

It was in one *Hollingworth*'s Caſe, that my Lord *Coke* maintained this Prerogative, which happened *Anno* 39 *Eliz. viz.* Sentence was given in an Eccleſiaſtical Cauſe in the Country, the Party grieved appealed to the *Archbiſhop*, who affirmed the Sentence; then he appealed to the *Delegates*, who repealed both the former Sentences; and thereupon the Queen granted a *Commiſſion of Review*, *ad revidend* the Sentence given by the *Court of Delegates*, and upon a Motion in the *Queen's-Bench* for a Prohibition, ſuggeſting that this *Commiſſion of Review* was unlawful, becauſe it was expreſly enacted by the Statute 25 *H.* 8. that the *Sentence* of the Court of *Delegates* ſhould be *definitive*; the Prohibition was denied, and the *Commiſſion of Review* adjudged to be lawful.

25 H. 8. cap. 19.

Moor 462. Cro. Eliz. 571.

Serjeant *Moor*, who reports the ſame Caſe by the Name of *Halliwell*'s Caſe, tells us, that Juſtice *Fenner* was for the Prohibition; becauſe the *Pope*'s Authority being abrogated, and the Statute giving no farther *Appeal* than to the *Delegates*, therefore a *Commiſſion of Review* could not be lawful.

And this ſeems to be clearer Reaſon than the Chief Juſtice *Popham* gave againſt the Prohibition, which was, becauſe the Pope did uſually *Review* in Eccleſiaſtical Cauſes after a Sentence given by his Legates, therefore the Queen might do it; for all which the Pope could do, was now united to the Crown by the Statute 25 *H.* 8. *Cap.* 20. but that muſt be a Miſtake, for it was by the Statute 26 *H.* 8. *Cap.* 1.

One would think that the Attorney General's Arguments had prevailed on the Chief Juſtice to be of this Opinion, there being *fallacia conſequentis*

ſequentis in both; for certainly the Crown never claimed that wild and *lawleſs* Power which the Pope uſurped here *de facto*; for he diſpenſed with human Laws in all Caſes which he was pleaſed to call *Spiritual*; he made Proviſions on all Churchmens Benefices without their Conſent, and theſe and many more ſuch extravagant Powers, the Courts at *Weſtminſter* would ſometimes adjudge to be unjuſt and injurious to the Subjects.

So that the Statute muſt be underſtood of all thoſe Things which the Pope, by the erroneous Opinion of thoſe Times, *was ſuppoſed lawfully* to do, and which he actually did, though wrongfully, by the Sufferance of ſeveral of our Kings, having gained the Opinion and Reputation of ſupreme Head of the Church.

'Tis probable the Pope, by Virtue of that uſurped Supremacy, might grant *Commiſſions of Review* after Sentences given by his Legates; but 'tis certain, that after *H.* 8. had re-aſſumed the Supremacy, ſuch Commiſſions were granted by him and his Succeſſors. We have an Inſtance in our Books of one which was granted about 33 Years after the Supremacy was confirmed by Act of Parliament.

My Lord *Coke* tells us, it was in *Goodman's* Caſe, which is reported by *Dyer* by the Name of *Walrond* verſus *Pollard*, and it was thus, *ſſ. Goodman* was made Dean of *Wells* by King *Ed.* 6. he afterwards took the Prebend of *Wivelſcomb* held of the ſame Church, the Commiſſary of the Biſhop of *Bath* and *Wells* deprived him of the Deanery, becauſe he could not be a Dean and Prebend *ſimul & ſemel* in the ſame Church, from which Sentence he appealed to the Archbiſhop,

Walrond *verſus* Pollard, Dyer 273.

biſhop, who affirmed it; and thereupon he appealed to the King, but found no Relief, for the King granted the Deanery to *Turner*.

Afterwards *Anno* 1 *Mariæ*, ſhe granted a Commiſſion to the *Delegates* who reſtored *Goodman*; and after her Death *Turner* obtained a Commiſſion of Review, *Anno* 1 *Eliz.* by whoſe Sentence he was reſtored, though *Goodman* objected, that he being reſtored by the *Delegates*, there ought to be no farther Appeal.

Another Reaſon given by my Lord *Coke* to maintain theſe *Commiſſions of Review* is, That the Pope granted ſuch Commiſſions before the Statute, and the King was not reſtrained by the Statute; yet the Words are, That the Sentence of the Delegates *ſhall be definitive, and no farther Appeal ſhall be had.*

To me it ſeems plain, that Cuſtom hath obtained againſt this poſitive Law, and therefore I ſhall not enlarge upon it, but proceed to ſhew,

I. *Whether an Appeal differs from a Writ of Error?*

II. *Whether 'tis abated by the Death of the Parties, or either of them?*

III. *And laſtly, Whether a new Adminiſtration can be granted upon an Appeal.*

And I. *Whether an Appeal differs from a Writ of Error?* It was the Opinion of my Lord Keeper *Egerton* that it did, becauſe by a Writ of Error the Judgment is not impeached until it is actually reverſed; but the very bringing an Appeal, is a Suſpenſion of the firſt Sentence in the Spiritual Court.

Willoughby *verſus* Willoughby, Goldſ. 119.

Now

Now with Deference to his Opinion, I think this makes no Manner of Difference, and that the very Authorities which he produces to warrant his Opinion, prove the contrary.

'Tis true, the *Judgment* is not impeached by bringing the *Writ of Error*, nor the *Sentence* by bringing an *Appeal*: But as one is a *Superſedeas* to the Execution, ſo the other is a Suſpenſion of the Sentence, and this is proved by the Caſe in the *Year Book*, which the Lord Keeper *Egerton* cited to prove a Difference between a *Writ of Error* and an *Appeal*, where it was adjudged by the Chief Juſtice *Belknap*, and another Judge of the *Common-Pleas*, That if there is a Sentence of Deprivation againſt a Perſon, and he immediately appeals from it, the Church is not void by that Sentence, but he continues Parſon ſtill; for if it ſhould be reverſed, there ought not to be a new Inſtitution and Induction; ſo if there is a Sentence for a Divorce, and an Appeal brought, and that Sentence is reverſed, there ought not to be a new Marriage.

Plow. Abr. Tit. Quare Imped. 143

Now as a Sentence of Deprivation is to make an Avoidance, and a Sentence of Divorce to diſſolve the Marriage, and an Appeal ſuſpends the Force of ſuch Sentences, becauſe the Church continues ſtill full of the Incumbent, and the Marriage is not diſſolv'd; ſo the Effect of a *Judgment* at Law, is to have *Execution*, and that is *ſuperſeded* by bringing the *Writ of Error*, but the Judgment continues in Force till reverſed; ſo that there doth not appear to be any material Difference between a *Writ of Error* and an *Appeal*.

But there is a Difference between them upon the Death of the Parties, for if the *Appellant dies*, his Adminiſtrator may proceed; but if the Plaintiff in a Writ of Error in the *Exchequer Chamber dies*, the Writ itſelf is abated, as appears in the Caſes following, wherein ſome Diverſities may be obſerved.

1 Leon 278. For if the Appellant dieth *ante litis conteſtationem*, which in their Law is before Iſſue joined, in ſuch Caſe the Suit is *abated*, but not if he die *pendente lite*, which is after Iſſue joined, be-
2 Cro. 483. cauſe the Right to proſecute is then veſted in the Proctor, and though the Proſecutor *ceaſes to be*, yet the Suit continues.

'Tis true, by the Commiſſion of Delegates they are to proceed between ſuch Parties, but they have likewiſe Authority by that Commiſſion, to determine *in cauſis Adminiſtrationis unà cum ſuis incidentibus vel annexis qualitercunque, &c. ſummarie & juxta exigentiam juris*; ſo that the Eccleſiaſtical Law is appointed to be their Rule; and neither by that Law, or the Civil Law, is the Suit abated by the Death of *either Party*.

Beſides, where the Appeal is to the King in *Chancery*, he, by Reaſon of his original and ſupreme Juriſdiction, grants a Commiſſion to certain Perſons to hear it, which if he could do in Perſon, he might certainly determine it, notwithſtanding the Death of either Party, and by the ſame Reaſon thoſe Perſons may do it, becauſe his Authority is delegated to them; and all this was adjudged *Anno* 23 *Car.* 2. in a Caſe where *Henry Pollexfen* died Inteſtate, and Adminiſtration was granted to his Brother *Andrew* in an inferior Dioceſe. Afterwards the ſuppoſed Wife

Pollexfen verſus Pollexfen, 1 Vent. 133. 2 Lev. 6.

Wife of *Henry* ſuggeſting *bona notabilia*, obtained Adminiſtration in the *Prerogative Court*. Upon which, *Andrew* appealed to the *Delegates*, and died, and *Henry* the Son of *Andrew* got the Prerogative Adminiſtration repealed, and a new Adminiſtration to be granted to him; and the Wife brought a Prohibition, ſuppoſing the *Delegates* could not proceed after the Death of *Andrew*, becauſe they had Authority by their Commiſſion to proceed between ſuch Parties, which was now become impoſſible by the *Death* of one of them: But adjudged to the contrary for the Reaſons before mentioned.

Now this is different from a *Writ of Error* in the *Exchequer Chamber*; for in ſuch Caſe, if one of the Plaintiff's in Error die *after the Record is certified*; that is, after the Tranſcript is ſent thither, the Writ is abated; but the Plaintiff in the Action, notwithſtanding ſuch Abatement, cannot take out Execution upon the Judgment, until the Tranſcript is ſent back again into the *King's Bench* by a *Remittitur*.

'Tis true, if one of the Plaintiff's in Error die *before the Record is certified*, and if the Plaintiff in the Action ſhould take out Execution, ſuppoſing the Writ of Error to be abated, this Execution will be ſet aſide upon a Motion, and a *Superſedeas* will be granted *quia improvide*, &c. for the Plaintiff in the Action ought to ſuggeſt on the Roll, That one of the Plaintiffs in Error is *dead*, and then to move the Court for Execution. Brace verſus Pennoyer, 5 Mod. 438.

But 'tis otherwiſe if one of the Defendants in Error die; for in ſuch Caſe the Writ of Error is not abated, but the Plaintiff may bring a

Sef Fa' against the Executors of the dead Man, *ad audiend Errores, &c.*

III. Lastly, *The Court of* Delegates *cannot grant a new Administration upon an Appeal, because they have a Power only corrigere, & non exequi:* As for Instance, the Question in the *Ecclesiastical Court* in *York* was, Whether a Will or not? And Sentence there was given for the Will; from which there was an Appeal to the *Delegates*, and that Sentence was repealed, and they granted Administration to the Appellant. Afterwards, upon a suggesting of *bona notabilia*, the Prerogative Court of *Canterbury* granted Administration to one, and the Archbishop of *York* granted Administration to another, who gave a Release to the Debtor of the Intestate; then he to whom Administration was granted by the *Delegates*, brought an Action against that Debtor, who pleaded this Release; and the better Opinion was, That the Plaintiff had no Title to the Action, because the Administration granted by the *Delegates*, was void for the Reason already mentioned.

Stephenson *versus* Wood, 2 Bulst. 2, 3.

Appurtenances.

Appurtenances are Things Corporeal, belonging to other Things of an higher Nature, as Hamlets to a chief *Mannor*, Common of Pasture, Turbary, Piscary, *&c.* or Lands to an House; they are also Things incorporeal, as Liberties and Services of Tenants.

I shall under this Title treat only of *Appurtenances Corporeal*, and first I shall observe, That

That Things may be ſaid to be appertaining in Reference only to the *Extent of the Deviſe*, as if an ancient *Houſe* is deviſed with the Lands thereunto *appertaining*. Now if ſome Lands were *newly* uſed with the Houſe, and a Queſtion ſhould ariſe, whether thoſe Lands paſs or not? This is a Queſtion which relates to the *extent of the Deviſe*, and what or how much was intended to paſs by it. Vaugh. 109.

Things may alſo be ſaid to be appertaining, when they relate *to the Nature* of the Thing deviſed, as if a Mill is deviſed where there is no Water-Courſe to it, in ſuch Caſe nothing paſſes but the Structure; but if the Teſtator afterwards Purchaſes a Water-Courſe, and then deviſeth the Mill with the *Appurtenances*, or if he acquire an Enlargment or bettering the Water-Courſe, though but *newly*, it paſſes by the Word *Appurtenances*.

So if a Man deviſes his *Saddle*, with the Appurtenances, the *Girts* and *Stirrops* paſs.

The Queſtions which have been made upon this Word are,

I. *How long Time a Thing muſt be uſed with another, to make it properly* appertaining *to the Thing with which it is uſed.*

II. *Whether Lands will paſs by the Deviſe of an* Houſe with the Appurtenances.

I. As to the firſt of theſe Queſtions, the Anſwer is very ſhort, and it was given by my Lord Chief Juſtice *Anderſon* above 130 Years ſince, *viz.* if Land is uſed with an Houſe for the Space of *Ten Years* and upwards, it hath Cro. Eliz. 16. Vid. 6 Rep. 64. a. contra.

by that Time gained the Name of Parcel or appertaining to the Houſe.

II. But as to the ſecond Queſtion, *viz. Whether Lands will paſs by the Deviſe of an Houſe with the Appurtenances*, there are various Opinions and Judgments in our Books.

Butcher *verſus* Samford, Goldſb. 99. *Anno* 30 *Eliz.* The Teſtator being ſeiſed in Fee of the Manour of *Stonehouſe*, and of ſeveral Tenements in the Pariſh of *H.* and alſo of a Tenement in *O.* which was only a *lieu Conus* in the ſaid Pariſh of *H.* and to which ſeveral Lands did *belong*, lying both in *H.* and *O.* deviſed all his Tenement in *O. with the Appurtenances.* And the Queſtion was, whether the Lands in *H.* which did appertain to the Tenement in *O.* did paſs by this Will, and adjudged they did paſs by the Word *Appurtenances.*

Chard *verſus* Tuck, 3 Leon 214. Cro. Eliz. 89. In the ſame Year another Perſon being ſeized in Fee of an Houſe, and a *Curtilage and Garden* to the ſame belonging, and there being no Way to either of them but through the Houſe, he deviſed the Houſe alone without ſaying *cum Pertinentiis*, and adjudged that both the *Curtilage and Garden* paſſed. For as my Lord *Coke* tells us, a *Curtilage* or Court-Yard is Parcel of the Houſe, and paſſeth with it, but certainly there is not the ſame Reaſon, for a Garden, and therefore the Court doubted as to that: But at laſt they held it would paſs, becauſe it was not only for Pleaſure but for *Neceſſity.* And this I take to be a very comprehenſive Reaſon for it takes in every Thing which may be of neceſſary Uſe with the Houſe, and yet very few Things will paſs by the Word *Appurtenances*, though they are of *Neceſſity* to thoſe who dwell in the Houſe.

2 Bulſt. 113.

About

About eleven Years afterwards there was a Deviſe of an *Houſe* with the *Appurtenances*, and now the Deviſee was got beyond the *Court-Yard* or *Garden*, for he claimed *Land in the Field* by Vertue of this deviſe, and the Court held that he might have it, if it was uſed by thoſe who dwelt in the Houſe for the Space of ten Years or more, but the Houſe being *Copyhold* and the Land in the Field being *Freehold*, it was plain that it could not belong to the Houſe. Yates *verſus* Clinard, Cro. Eliz. 704. Godb. 353.

Before any of theſe Caſes happened, *viz. Anno* 27 *Eliz.* the Court made ſome doubt, whether *Lands* would paſs by the Deviſe of an *Houſe* with its *Appurtenances*. The Caſe was thus, Higham *verſus* Horwood, Moor 211. 1 Leon 34. Godb. 40.

ſſ. The Teſtator being ſeized in Fee of an Houſe and 92 Acres of Land, and being a very illiterate Man, ordered a Scrivener to write his Will, and directed him to write, that *his Houſe and Lands* ſhould be ſold by his Executors, and that the Money ſhould be diſpoſed for the Advancement of his Iſſues. The Scrivener writes it thus. *viz. I will that my Houſe with the Appurtenances ſhall be ſold*, &c. and did not mention the *Lands*: But as it is reported by *Leonard* and *Godbolt*, the Court was of Opinion, that the *Lands* did paſs by the Word *Appurtenances*; for it being in a Will, that Word ſhall be adapted to the Intent of the Teſtator. And yet Serjeant *Moor* who reports the ſame Caſe tells us, the Court would adviſe upon it, but probably that might be upon the firſt Argument.

However the later Authorities ſeem to be quite otherwiſe: The firſt I ſhall mention was *Anno* 21 *Jac.* 1.

Lofius verſus Baker, Palm. 378. Godb. 352. 'tis there reported by the Name Knight's Caſe.

If The Teſtator was ſeized in Fee of an *Houſe* called *Brocks*, and of 80 Acres of *Land thereunto appertaining*, and of another *Houſe* called *Locks*, and being ſo ſeized made a Feoffment in Fee of *Brocks*, and the 80 Acres. And by another Feoffment made to him, he took back the ſame Houſe and Lands *and* 40 *Acres more* by *another Name*. And about ten Years afterwards, he deviſed his Houſe called *Brocks* with *all the Lands thereunto appertaining* to his youngeſt Son; now though he *uſed the* 40 *Acres*, with his Houſe for *ten Years* together, yet it was adjudged they did not paſs by this Deviſe *as appertaining* to his Houſe, becauſe they were conveyed to the Teſtator by another Name, and not known by the Name of *Brocks*.

Hearn verſus Allen, Cro. Car. 57. Hutt. 85: Lit. Rep. 8.

But the modern Reſolutions are ſtill clearer, *viz.* That by the Word *Appurtenances Lands* will not paſs, but only ſuch Things which *properly* do appertain to an *Houſe*; 'tis true, *Lands* may appertain to an *Houſe*, but not ſo *properly* as many other Things; therefore to make *Lands* paſs they muſt be expreſſed, *viz.* with the *Lands thereunto appertaining*.

Archer verſus Bennet 1 Ley. 131.

So where the Teſtator had a Cloſe, and an Houſe built on Part of it, and a Kiln built upon another Part of it for drying Oats, and alſo two Mills to make Oat-meal adjoining to the Cloſe which were uſed together for ſeveral Years, but lately divided, and then he ſold the *Houſe*, and one Part of the *Cloſe*, and kept the other Part, and the Kiln which he uſed with the Mills, and then deviſed the *Mills with the Appurtenances* to the Plaintiff, and it was adjudged that the *Kiln* did not paſs; for by a

Grant

Grant of *an House with the Appurtenances*, no other Thing will pass but what *properly* appertains to it; but 'tis otherwise, if a Devise is of an *House* with the *Land thereunto appertaining*.

But Justice *Windham* was of Opinion in this last Case, that if it had been specially found that the *Kiln* was necessary for the *Mills*, and that they were not useful without it, the *Kiln* might have passed as Part of the *Mills*, though not by the Word *Appurtenances*; for nothing passes by that Word but what may *properly* appertain, as a Devise of an *House*, with the *Appurtenances*, the *Conduits* and *Water-Pipes*, tho' at a great Distance pass, because those are Things which *properly* appertain to an House.

Assent to a Legacy.

ASSENT to a Legacy or Devise of Personal Things is a perfecting Act, 'tis like an *Attornment* to a Grant of a Reversion, or an Admittance upon a Surrender of a Copyhold Estate, so that the Executor's Assent to a Legacy, seems necessary to the Execution of it; and therefore in our old Books, 'tis held, that if a Devisee of Goods and Chattels take them without the Delivery of the Executor, he may have an Action of Trespass against him. Kilw. 128. Dyer 254 a.

It was formerly held, that the Assent of the Executor was not necessary to a *Specifick* Legacy of any Goods or Chattels: But the Law is now otherwise, for if the Legatee might take the Thing itself without the Assent of the Executor, it might subject him to a *Devastavit*, in Case

Case there should be Debts owing, and this without any Fault in him.

But though the Assent of the Executor is so very necessary to the due Execution of a Legacy of Goods in general, yet 'tis not of that Force or Efficacy as to make a Legacy good, which in its self is void; as for Instance.

Bransbie *versus* Grantham Pl. Com, 525.

An Executor having a Term for Years as *Executor*, devised it to a *Stranger* and made his Son Executor and died, the *Stranger* entred by the *Assent of the Son*, and afterwards he as Executor to his Father entred upon him, and adjudged lawful; for the Devise was void to the *Stranger*, because an Executor cannot devise what he hath *as Executor*, it being in such Case for the Use of the Testator, and by Consequence the Devise is avoid; and if so, the Assent given to a void Devise must be also void, and it shall never endure as a new Grant, but only as an Assent to the Thing devised.

Neither is the Executor's Assent necessary to a Devise of *Lands*, for the Devisee in Fee or in Tail, or for Life or Years, of Lands, may enter into the same without his Assent, insomuch, that if the Heir enter before him, the Devisee may enter and eject him.

'Tis agreed, that the Assent of the Executor is necessary to the due Execution of a Legacy of Goods and Chattels, but there seems to be some Difference as to this Matter, between a Devise of the *Use* of such Chattels, to *one* who is likewise made *Executor*, and a Devise of the Use thereof to a *Stranger*, and after his Death to *another*; for if the Executor possesses himself of those Goods and useth them, this will not execute the Devise over him in *Remainder* without

without his Assent; but if the Devise is to a *Stranger* and not to an *Executor*, in such Case, if the Executor deliver the Goods to the *Stranger* to use them during his Life, this will be a good Execution of the Legacy to him in *Remainder*; so that after the Death of the *Stranger*, he in *Remainder* may seise and detain the Goods wherever he finds them.

I shall conclude this Title by shewing, that an Assent to a Devise may make the Executor himself take as Devisee, for where the Testator was possessed of a Term for Years, and devised the same to his Daughter for so many Years as she should live, Remainder to *John Holloway*, and made his Daughter's Husband Executor and died, after whose Death the said Executor declared, that if his Wife was dead his Estate in the Lands was ended, and that it remained to the *Hollowaies*; adjudged this was a sufficient Declaration to make him take the Term as Devisee in Right of his Wife, and if he had not made such Declaration he might have taken it as Executor, so that now he held it only during the Life of his Wife, but might have otherwise held it during his own Life.

Southward *versus* Millard, March 137.

See Garret *and* Lister's *Case.*

Assets.

THE Word is derived from the *French Assez*, in *Latin Satis*, and signifies that there is *enough* left by the Deceased to discharge that burthen which is cast upon his Executor or Heir, as well to satisfy his Debts as to pay the Legacies by him bequeathed.

See tit. Outlary.

Assets

Assets are of two Sorts;

I. (1.) *Assets inter manis.*
(2.) *Assets by Descent.*

Assets *inter manis* is where the Testator dies indebted, leaving sufficient to his Executor to discharge both his Debts and Legacies.

And because there have been many Questions made what shall be accompted Assets, and what not, I shall mention the Resolutions on either Side as I find them dispersed in our Books.

(1.) *And first what shall be accompted Assets.*

In the old Books 'tis held, that if a Man hath a *Term* as Executor and afterwards he purchaseth the *Inheritance*, the Term shall not be extinct, but shall remain as *Assets*.

Chapman's *Case* cited in Shelley's *Case*, 1 Rep. 98. B.

So where a Person covenanted with the Testator to make him a Lease for Years, and the Testator died before the Lease was made to him, and afterwards it was made to his Executors; now tho the Term commenced in their Time, yet because the Covenant was made with their Testator, and by Vertue thereof the Estate was granted to his Executors, the Term shall be Assets in their Hands.

This agrees with Justice *Walmsley*'s Opinion in *Corbett*'s Case, *viz.* That if an Executor surrender a Lease for Years, which he had as Executor to him who hath the Reversion in Fee, tho' the Term is extinct as to him in Reversion, yet it shall remain Assets in the Executor as to Creditors and Legatees, and that the

1 Rep. 87.

Law

Law was the same if the Executor himself had purchased the Reversion.

So where the Testator was possessed of Leases for long Terms of Years, and devised the same to his Wife for Life, then to his eldest Son for Life, and to the Heirs Male of his Body, and died, owing several great Debts, and leaving his Wife Executrix, she proved the Will and paid so much of the Debts as the Stock did amount unto, and then *Assents* to the Devise of the said Leases, and died, leaving one *Croft* her Executor, who articled with the Plaintiff to sell the Leases to him; it was insisted by the Defendant, that by this Devise and the *Assent* of the Executrix, the Leases were vested in him in Remainder, and could not be divested by the Sale of *Croft* her Executor, but adjudged, that the Leases should be *Assets* in his Hands notwithstanding the Assent of the Executrix, and that *Croft* should convey pursuant to the Articles; but that if after such *Assent* the Son had sold the Leases for a valuable Consideration, the Sale had been good, because he had a good Title in Law, and the Purchaser should not be defeated by this Trust for the Creditors. *See* Banes *Case*. Chamberlaine *versus* Chamberlaine, 1 Ch. Rep. 256.

Where a *Mortgage* is made for a *Term for Years*, the *Equity of Redemption is Assets*, and so is a * *Lease* made to attend the *Inheritance*. * 2 Ch. Rep. 152.

† But if a Lease is made rendring Rent to the Lessor his *Heirs* and Assigns, and his Executor received the Rents several Years after the Death of the Lessor, this shall not be Assets, because it belonged to the Heir. † Dyer 361.

‖ Money decreed in *Chancery* by Reason of any Executorship, Money arising by Sale of Lands by ‖ Harcourt *versus* Wrenham, Moor 858. 1 Brownl. 76.

by Executors ſhall be Aſſets, and ſo ſhall Damages recovered by an Executor, *pro bonis aſportatis in vita Teſtatoris*. In the old Books, 'tis held, that if an Executor Merchandize with the Goods of the Teſtator, the Encreaſe ſhall be Aſſets, and this agrees with the late Reſolutions in Equity, (*viz.*) if the Executor lends the Teſtator's Money and receives Intereſt, that ſhall be Aſſets; 'tis true, there are ſome Caſes to the contrary, becauſe the Executor is not bound to lend, and if he doth, 'tis at his Peril, therefore, as he is to bear the Loſs, ſo he ought to receive the Profit, but the contrary Opinion now prevails.

21 H. 6. 35.

Ratcliffe *verſus* Graves, 2 Ch. Rep. 172.

Upon *plene adminiſtravit* pleaded, the Plaintiff replied Aſſets, *die impetrationis brevis*, and the Evidence was, that at that Time a Sum of Mony (to the Value of the Debt) was brought into the prerogative Court to be delivered to the Defendant as Executor, *&c.* which in Fact was true, but the Executor proved, that on the ſame Day the Court ordered the Mony to a Creditor of his Teſtator, yet the Plaintiff recovered; but my Lord *Dyer* tells us, it was by a narrow Pinch, for the Defendant might have helped himſelf by ſpecial pleading.

Dyer 208.

If the Mortgager pays the Money to the *Heir* of the Mortgagee, he ſhall not take it as Heir, but as Executor, and it ſhall be Aſſets in his Hands.

3 Leon. 32.

What ſhall be Aſſets notwithſtanding a Releaſe.

As to this Matter I find that a Releaſe made by an Executor ſhall not prejudice the Creditors ſo as to extinguiſh the Aſſets, as for Inſtance:

‖ An Executor was ſued, who pleaded *riens in ſa mains*, the Jury found that one became bound

‖ 3 Leon. 51.

to

to his Teſtator in a Bond of 100*l.* for Performance of Covenants, which afterwards were broken; and that the Executor put the Bond in Suit and pending the Action, ſubmitted himſelf to an Award, and the Arbitrators awarded the Obligor to pay to the Executor 70*l.* and that he ſhould releaſe the Bond, which was done; but yet the Executor was adjudged to be anſwerable for Aſſets to the Value of the Bond, which was 100*l.* for tho' he was compelled to make the Releaſe, yet it was his own Act to ſubmit to the Arbitration.

Debt upon Bond due to the Teſtator, this is not Aſſets in the Hands of an Executor till recovered, becauſe 'tis but a *Choſe in Action*; but if the Executor *releaſeth* the Debt the Action is gone, which is very true; but the Debt is then Aſſets in his Hands to the whole Value of the Bond, for the *Releaſe* is as good Satisfaction in Law, as an actual Satisfaction would have been; becauſe the Law intends the Executor would not have made a *Releaſe* without a full Recompence and Satisfaction from him to whom it was given. Owen 56. Hob. 66. Godb. 29.

It might be otherwiſe where the *Certainty* of the Sum releaſed doth not appear, for in ſuch Caſe 'tis likewiſe uncertain what the Executor might have covered, if he had not releaſed; but if it doth appear or can be proved how much was due, it is Aſſets.

Therefore where the Debt is certain, as 'tis always on a Bond, a Releaſe of that Debt makes it Aſſets in the Hands of the Executor, and ſo it was adjudged *Anno* 26 *Eliz. viz.* an ‖ Adminiſtrator *durante minore ætate* of an Infant Executor received 600 due to the Teſtator, the Infant 1 Kighley *verſus* Kighley, 1 And. 138. Cro. Eliz. 43. 4 Leon. 102. Godb. 29.

Infant Executor came of Age and then he proved the Will, and releaſed the Adminiſtrator of all Actions, and in an Action of Debt brought againſt the Executor it was adjudged, that ſo much as he releaſed being certain, ſhall be Aſſets in his Hands, becauſe he hath given away that which might have been Aſſets, and it ſhall be intended that he hath received Satisfaction from the Adminiſtrator to whom the Releaſe was given.

Goods ſhall not be Aſſets till recovered.

In ſome Caſes Goods ſhall not be Aſſets till recovered and in the actual *Poſſeſſion* of the Executor or Adminiſtrator; and in ſome Caſes 'tis otherwiſe, to give Inſtances in both.

Bethell *verſus* Stanhope, Cro. Eliz. 810. Owen 132. 2 And. 272.

Judgment was had againſt one *Vaughan*; then he made a fraudulent *Gift* of his Goods to his Daughter, who by Vertue of this Gift did give the Defendant Authority to take and diſpoſe the Goods to his own Uſe, which he did, and then he got Adminiſtration, and a *Sci. fa.* was brought againſt him as Executor to *Vaughan*, to have Execution on the ſaid Judgment, who pleaded *reins inter maines*, and this Matter being found ſpecially, the Plaintiff had Judgment; for by the Defendant's intermeddling with the Goods, tho' he was not a lawful Executor at that Time, yet he became *Executor de ſon Tort*, and a Creditor hath Election to ſue him as ſuch, or as Adminiſtrator, he might ſue him as *Executor de ſon Tort*; becauſe the Gift to the Daughter being void, ſhe could give him no lawful Authority to take them, therefore he became a Treſpaſſer, and they were Aſſets in his Hands, and the ſubſequent Adminiſtration did not purge that Treſpaſs: But if the Goods had been taken from the Inteſtate in his Life-time,

time, then they are not Assets till recovered and in the Possession of the Administrator.

So where the Plaintiff as Executor, and the Defendant submitted themselves to an Award, and the Arbitrators awarded the Defendant to pay the Plaintiff 300 *l.* A Creditor of his Testator attached this Money in the Defendant's Hands as due to the Testator; 'tis true, it would have been Assets if the Executor had received or recovered it, but not otherwise, and so not attachable as a Debt due to the Testator *tempore mortis.* Horsey *versus* Turges, 1 Lev. 105. 1 Vent. 111.

The following Case is where Goods have been adjudged Assets, tho' they were never in the Possession of the Executor, and it was thus:

If. The Testator made *W. N. Executor durante minore ætate* of *R. B.* and made the said *R. B.* Executor when he came of Age, and it happened that some of the Goods were in the actual Possession of the said *W. N.* after the Executor came of full Age, and after he took upon him the Executorship, yet those Goods shall be Assets in the Hands of *R. B.* the Executor, tho' he never had the Possession of them, because he might have recovered by Trover against *W. N.* if he would. Chandler *versus* Thompson, 1 Roll. Abr. 921. Hob. 265.

If the Obligee die Intestate, and the Ordinary should commit Administration to the *Obligor*, the Debt is *extinct* by the Grant of Administration, but yet it shall be Assets in the Hands of the Administrator to satisfy Creditors, because the Ordinary had no Power to discharge the Debt. Holliday *versus* Boas, 1 Roll. Abr. 920.

‖ The Law is the same if the Obligee himself makes the Obligor Executor, the Debt is *extinct* by the Will, but it shall remain as Assets to Creditors. ‖ 1 Roll. Abr. 921.

Devise of Lands for Payment of Debts.

There have been some nice Distinctions made to charge the personal Estate where the Testator hath devised his Lands for Payment of his Debts, and this is done in Favour of the Heir:

1 Roll. Abr. 920.

If. The Testator devised his Lands *to be sold by W. N.* for the Payment of his Debts and Legacies, and made the said *W. N.* his *Executor*, and died, it was adjudged that the Money received by him upon the Sale shall be *Assets*; but where the Land is devised to be sold by his Executor *and others*, there the Money arising by such Sale shall not be Assets, because *they* are not entrusted with it as *Executors.*

Shaw *versus* Huntly, 1 Roll. Abr. 920. Hardres 405.

But where a Devise is of Lands *to his Executor* to sell, and with the Money arising by such Sale, and with his personal Estate to pay his Debts, there the Money received by the Sale shall be Assets, so 'tis if Lands were *devised to be sold by his Executors.*

2 Vent. 349.

If Lands are devised to be sold for Payment of Debts and Legacies, and the *Residue of the personal Estate is given to the Executor after Debts and Legacies paid*, yet that personal Estate shall be Assets, and applied to the Payment of Debts as far as it will go, and the Land shall be charged no farther than is necessary to make up what remains unpaid, and this is in Favour of the Heir.

Where the *Ancestor* entered into Bonds and dies seised of Lands in Fee which descend to his *Heir*, the Lands are chargeable as real Assets to satisfy his Debts, and this is called Assets by Descent; and the Law was formerly, that if the *Heir alien* the Land *before* the Bond was put in Suit, the Debt was lost.

But

But now by the Statute 3 & 4 *W. & M. cap.* 14. the *Heir* ſhall be anſwerable by an Action of Debt to the Value of the Land ſo ſold, and Execution ſhall be taken on a Judgment obtained againſt the Heir in ſuch Action to the Value of the Land as if the Debt was his own; but the Land which is *bonâ fide*, ſold before the Action brought, ſhall not be liable to the Execution.

It hath been a Queſtion whether an *Equity of Redemption* by the *Heir* of the Obligor was Aſſets in his Hands, to ſatisfy a Debt claimed by the Executor of the Obligee, but it hath been decreed that it is Aſſets. *Trevor verſus Perroyer*, 1 Ch. Rep. 148.

And ſo is a Leaſe to attend the Inheritance, and ſo is an Advowſon, and it ſhall be recovered after the Rate of one Shilling for every Pound or Mark the Church is worth, 1 *Inſt.* 374. 2 Ch. Rep. 152.

If a *Ceſtui que Truſt* dies and leaves a Truſt in Fee to deſcend to his Heir, this ſhall be Aſſets by Deſcent, and the Heir ſhall be liable for the Debt or Obligation of his Anceſtor, as if the Eſtate had deſcended to him in Poſſeſſion, which was not ſo before this Statute, for even in Equity a Truſt of Lands was not Aſſets; and for this we have a notable Caſe about 15 Years before the making the Statute, as for Inſtance: 29 Car. 2. cap. 3.

Ralph Allen purchaſed Lands in his own Name and in the Name of one *Hammond*, but the Truſt to *Hammond* was not expreſſed in the purchaſe Deed, afterwards *Allen*, and his Son became bound for a Debt of *William Allen*, and after the Death of all the ſaid Parties the Daughters and Co-heirs of *Ralph* upon a Bill in Equity againſt the Heir of *Hammond*, had the Land decreed to be conveyed to them by the ſaid Heir in Performance of the Truſt. *Bennet verſus Box*, 1 Ch. Rep. 12.

Then another Bill was brought by the Creditors againſt the ſaid Co-heirs, to have the Land made liable to the ſaid Debt as Aſſets in Equity; but tho' the Heir of the Truſtee was decreed to convey to them, yet it was farther decreed the truſt Lands ſhould not be Aſſets.

Dyer 368. The Obligor bound himſelf and his Heirs, and had Iſſue two Sons, and died; the eldeſt Son entered on the Lands, and died without Iſſue, then the youngeſt Son entered; and in an Action of Debt brought againſt him upon this Bond, it was adjudged, That he ſhould be charged with Aſſets as Heir to his Father, notwithſtanding the intermediate Deſcent to his elder Brother.

What ſhall not be Aſſets.

Next I ſhall mention ſome Caſes, wherein it hath been adjudged what ſhall not be Aſſets in the Hands of an Executor or Adminiſtrator.

And firſt 'tis held, That a Debt upon Bond Owen 36. due to the Teſtator, is not Aſſets in the Hands of the Executor till recovered, becauſe 'tis but a *Choſe in Action*; but if the Executor releaſes the Debt, then 'tis Aſſets, becauſe he hath determined the Action.

Keilw. 63. So where the Teſtator pawned Goods, and his Executor paid to the Value and kept them, which he might do lawfully, becauſe the Property became altered by Way of Retainer, the full Value being paid, and therefore ſuch Goods ſhall not be Aſſets in his Hands.

Dyer 361. Likewiſe where the Teſtator made a Leaſe of an Houſe and Implements, rendering Rent to him, his *Heirs*, and Aſſigns, and died, the Executor received the Rent ſeveral Years afterwards; and all this was found ſpecially in an Action of Debt brought againſt the Executor, wherein the Iſſue was Aſſets or not, and the Verdict concludes,

& ſic,

& ſic, the Defendant had Aſſets; but adjudged, That the Rent belonged to the Heir, and the Word *& ſic* was void.

The Teſtator appointed certain Lands to be ſold by his Executor, and the Money ariſing by the Sale to be diſtributed amongſt his Daughters, *when they ſhall accompliſh their Age of* 21 *Years*; the Executor ſold the Lands; adjudged, That the Money ſhall not be Aſſets in his Hands in the mean time to ſatisfy the Debts of the Teſtator, becauſe 'tis limitted to a particular Uſe. Germin's *Caſe*, 1 Leon 87. 4 Leon 82. 1 Leon 225.

A Reverſion in Fee expectant upon an Eſtate Tail is not Aſſets, becauſe 'tis in the Power of the Tenant in Tail to bar it when he will, * but after the Eſtate Tail is ſpent, 'tis then become Aſſets. 6 Rep. 58. B. 2 Roll. Rep. 129. 1 Roll. Abr. 557. * 3 Mod. 257.

ſſ. † *K* had Iſſue *R.* and *S* and conveyed Lands to the Uſe of himſelf for Life, Remainder to *R.* in Tail Male, Remainder to his own right Heirs, then *K.* died, and the Reverſion deſcended to *R.* who died ſeiſed; then the Reverſion deſcended to his Son, who died alſo without Iſſue, ſo that the Tail was ſpent; then *S.* the youngeſt Son of *K.* entered; and it was adjudged, That theſe Lands ſhall be Aſſets to anſwer the Debt of his Father, and the ſole Queſtion was, Why he ſhould be charged as Heir to his Father, without naming the intermediate Deſcent to his elder Brother and Nephew. 3 Lev. 287. 1 Roll. Rep. 234. † Kellow *verſus* Rowden, 3 Lev. 286. 3 Mod. 253

If a *Copyhold* deſcends to an Heir, this ſhall ſhall not be Aſſets, becauſe 'tis an Inheritance created by Cuſtom, and the Common Law directs the Deſcent; but not that it ſhall have any other collateral Qualities which do not concern ſuch Deſcent, and which other Inheritances at Common Law have. 4 Rep. 22. *a.*

I ſhall conclude this Title with ſome Caſes relating to Pleading, and other Matters pertinent to it.

Aſſumpſit, in which the Plaintiff declared, that the Defendant being poſſeſſed of a Term for Years as Executor to *W. R.* who owed Money to the Plaintiff, in Conſideration that the Plaintiff would defer the Payment till *Michaelmas* next, he (the Defendant) promiſed to pay it; upon *non aſſumpſit* pleaded, the Plaintiff had a Verdict, and upon a Writ of Error brought, the Error aſſigned was, that the Plaintiff had not averred in his Declaration that the Defendant had Aſſets; but adjudged that he need not, becauſe it ſhall be intended that he had Aſſets, and that the Teſtator would not leave a greater Charge upon his Executor, then he would leave wherewithal to diſcharge it.

Bane's *Caſe*, 5 Rep. 94.

Cottington *verſus* Hulett, S.P. Cro. Eliz. 59.

The Teſtator deviſed, that ſuch Lands, naming them, ſhould be ſold by his Executor, and the Money ariſing by ſuch Sale ſhould be diſtributed amongſt his Daughters. The Lands were ſold, and the Money was in the Hands of the Executors; adjudged it *ſhall not be Aſſets* in their Hands to pay the Teſtator's Debts, becauſe they were deviſed to a particular Purpoſe.

2 Leon 115 Geering's *Caſe*.

Aſſumpſit againſt an Executor, who pleaded a Bond of 40 *l.* given by his Teſtator to *W. R.* yet unpaid, and that he had not Aſſets *ultra* 5 *l.* to ſatisfy that Debt. The Plaintiff replied, that the Bond was for 40 *l.* conditioned for the Payment of 20 *l.* *on a Day not yet come*; and upon a Demurrer to this Replication, it was adjudged ill, becauſe the Plaintiff did not alledge, that the Defendant had *Aſſets ultra* 20 *l.* for if he hath not, then he is not bound to pay the Plaintiff's Debt due

Lemmon *verſus* Fowke, 3 Lev. 57.

due to him upon simple Contract, before a Debt upon Bond payable at a Day to come.

If. A Man made several Executors living in several Counties, one of them possessed himself of all the Goods, and the other had nothing, yet he cannot plead *plene administravit*, for Assets in the Hands of one Executor is so in both; and the Jury in one County may find Assets in another County; because 'tis the *Finding* which is Matter of Substance, and the *Place* is but Surplusage: For if the Defendant plead *plene administravit ad Exceſter*, the Jury may find Assets in *Ireland*, for 'tis a Thing transitory, tho' it hath been sometimes doubted, for my Lord *Dyer*, *Anno* 28 *H.* 8. tells us, it was but lately so adjudged; he tells us farther, this must be personal Assets, and not Assets of Lands where Debt is brought against the Heir, *Dyer* 271. *B.*

Keilw. 51.

Richardson *versus* Dowdale, 6 Rep. 46. 2 Cro. 56.

Dyer 30. *B.*

Debt against an Executor, who pleaded *plene administravit*; the Plaintiff replied Assets, *die Exhibitionis Billæ*, *viz.* 23 *Octobris*, which was the first Day of *Michaelmas* Term; now if it appear, that the Bill was not filed till fourteen Days afterwards, or within the Term, whatever the Defendant had in his Hands and paid within that Time, and before the Bill filed, if it was paid in discharge of a Debt in equal Degree, shall be Assets.

Man *versus* Adams, Sid. 432.

An *English* Bill was brought against an Executor to discover Assets, the Defendant demurred, because it was brought before any Suit commenced at Law; for if such Suit had been brought, the Defendant might have confessed the Debt, or have paid it, but by this Means he may be doubly vexed.

Clough *versus* Floyd, Hardres 115.

Hard *verſus* Bard, 2 Cro. 602. Booth *verſus* Crompton 2 Cro. 613. S. P. *Lee *verſus* Ridford, 1 Roll. Rep. 58.

Where an Executor is ſued upon a Promiſe to pay a Legacy, the Plaintiff need not aver that he had Aſſets at the Time of the Promiſe made, for it ſhall be intended he had, otherwiſe he would not have made the Promiſe.

* Then as to the finding of the Jury, (*viz.*) Debt was brought againſt an Executor for 300 *l.* and Aſſets were found to 200 *l.* and Judgment for the Plaintiff, that he ſhould recover *de bonis Teſtatoris*, and upon a Writ of Error that Judgment was affirmed.

Evet *verſus* Sutcliffe, 1 Roll. Rep. 214.

But if the Jury had not found to what *Value*, it had been void; for to find Aſſets generally, without ſaying to *what Value*, is void, becauſe the Plaintiff ought to recover only according to the Aſſets found, which muſt be certain

So where 'tis found that an Heir had ſeveral *Lands and Tenements* by Deſcent, 'tis void, becauſe it may be true, and yet the Defendant may have no Aſſets, for a Reverſion expectant upon an Eſtate Tail is a *Tenement*, and yet that is not Aſſets.

Aſſignes. See *Executor of Executor.*

Averment, out of a Will. See Poſtea *tit.* Deſcription.

AVerments have been allowed to ſupply a Defect, and to take away Surpluſages in Wills, I ſhall give ſome Inſtances in both.

2 Leon 35. 3 Leon 7. 4 Leon 104.

And firſt to ſupply a Defect; ſſ The Teſtator deviſed his Lands, and yet his Name was not in the whole Will; but by an Averment of his Name, and Proof that it was his Will, it was held to be good.

The

The Teſtator deviſed Lands *to the Heirs of W. N.* and the Clerk wrote to *W. N. and his Heirs*, this may be helped by an Averment, becauſe his Intent is written, *and more:* But if the Deviſe had been to *W. N. and his Heirs*, and the Clerk had written *to the Heirs of W. N.* in ſuch Caſe an Averment would not have made it good to *W. N.* becauſe 'tis not in Writing, which the Statute requires all Wills to be; ſo that an Averment may be allowed to take away a Surpluſage, but not to *encreaſe* that which is defective. Godb. 131

So where the Teſtator deviſed ſeveral Mannors to his Son in Tail, Remainder to *Thomas Cheyney* in Tail, upon Condition that *he or they, or any of them ſhall not alien*, adjudged, That no Proof ſhall be allowed, or any collateral Averment out of the Will, whether the Teſtator intended by thoſe Words to reſtrain *Thomas Cheyney, and the Heirs of his Body only.* *Lord Cheyney's Caſe*, 5 Rep. 68.

Ever ſince this Caſe of my Lord *Cheyney* it hath been conſtantly held, That there cannot be any Averment to add any Thing to a Will by Words *Dehors*, nor to abridge it by any Condition added thereunto by ſuch Words; for all Wills (as already hath been obſerved) muſt be in Writing, and to aver any Thing which cannot be collected out of the Words of the Will, makes Part of it in Writing, and Part not. Molineux *verſus* Molineux, 2 Cro. 145.

Therefore, where the Teſtator deviſed Lands to his Wife *for Life generally*, this cannot be averred to be *for her Jointure*, and in Bar of her Dower, becauſe a Deviſe imports a Conſideration in it ſelf, and an Averment ſhall not be allowed to any other Uſe than what appears in the Will; that is, no Averment ſhall be taken out of the Will, which cannot be collected to Leak *verſus* Randall, 4 Rep. 4. a. *cited in* Vernon's *Caſe.*

be

be the Teſtator's Intent by the *Words* in the Will it ſelf.

Lawrence *verſus* Dodwell, 1 Lut. 734.

And ſo it was held in a late Caſe, *(viz.)* in Dower, the Tenant pleaded, That the Huſband made a Will, and deviſed the Lands to the Demandant during her Widowhood, and averred this was in Recompence of her Dower; but it was adjudged, that no ſuch Averment could be made, for there was nothing like it in the Will.

'Tis true, if the Deviſe had been to her for *Proviſion and Maintenance*, tho' the Word *Jointure* had not been in the Will, it might have been averred that it was for her *Jointure*, becauſe 'tis conſiſtent with the Words of the Will.

So a Deviſe to his Son *John*, and he hath two of that Name, it may be averred which he intended, for it cannot be repugnant, becauſe one *John* is written in the Will.

Chaloner *verſus* Bowyer, 2 Leon 70.

The Teſtator had iſſue two Sons and a Daughter, and he deviſed his Lands to his youngeſt Son in Tail, Remainder to *the Heirs of his eldeſt Son*, and if he die without Iſſue, Remainder to his Daughter and her Heirs; the youngeſt Son died without Iſſue in the Life-time of the eldeſt; adjudged, That the Iſſue of the eldeſt ſhall not take by this Deviſe, becauſe he himſelf could not take by the Name of *Heir* in the Life-time of his Father; whereupon he produced Witneſſes, who proved on Oath, That the Teſtator declared his Meaning concerning his Will, *(viz.) That as long as his eldeſt Son had any Iſſue, his Daughter ſhould not have the Land*; but this Proof was rejected.

See *Stead* verſus *Perryer Poſtea.*

Authority,

Authority, and no Intereſt by a Deviſe.

See *Sale of Lands.*
See *Executor's Right excluſive*, &c.
See *Legacy ſurviving.*
See *Daniel* verſus *Upley.*

UNder this Title I ſhall mention ſuch Caſes wherein it hath been adjudged, That the Deviſee had only an *Authority*, and no *Intereſt* in the Thing deviſed, and where he had an * *Intereſt* as well as an *Authority*.

See Chattels.
* *See tit.* Profits

Where he had only an Authority without an Intereſt, and that is generally by a Deviſe in ſuch Words as theſe,

ſſ. A Deviſe to another *to have the diſpoſing, ſetting, letting, and ordering of his Land*, ſo *to receive, ſet and let* it, ſo a Deviſe to his Son, but that *his Wife ſhould take the Profits*, &c. ſo where the Deviſe was, That his *Executor ſhould have the Overſight and Dealing of all his Land*; theſe Words, and ſuch like, give the Deviſee an Authority only, and no Intereſt.

As for Inſtance, *Anno* 28 *H.* 8. *Ceſtui que Uſe* deviſed, That *R. B.* ſhould have as well the Government and Ordering of his Children, as the *diſpoſing, ſetting, letting, and ordering his Land*; adjudged, this was an Authority, and no Intereſt, and that he could not ſell the Lands, for that could not be any *well ordering* for his Children. Dyer 26. B.

A Deviſe of his Land to his Son, but *That his Wife ſhould take the Profits thereof till he come of Age*; this is only an Authority to take the Profits 2 Leon 221 3 Leon 78, 216. Moor 635. S. P.

fits till that Time; and if ſhe die before her Son is of Age, that Authority is determined, otherwiſe, if he had deviſed the Profits of the Land to her till that Time.

Pigott *verſus* Garniſh, Cro. Eliz. 678.

A Deviſe to an Infant in Tail, and that one *Beſt* ſhould have the Overſight of his Will, and ſhould have the Education of his Son until of Age, and to *receive, ſet, and let it* for him; adjudged, That this Overſeer had no Intereſt, but an Authority only *to let at Will*, for he cannot make a Leaſe for Years in his own Name, nor in the Name of the Infant.

Carpenter *verſus* Collins, Moor 774. Yel 73. 1 Brownl 88

Deviſe of Land to his Son *when* he ſhould come to the Age of 24, and a Portion to his Daughter *when* ſhe ſhould come to 22, and that his Executor ſhould have *the Overſight and Dealing of all* his Lands and Goods until his Children come to the aforeſaid Ages: The Executor made a Leaſe of the Lands at Will, rendering Rent at *Lady-Day* and *Michaelmas*, the Son died before *Lady-Day*; adjudged, That by theſe Words the Executor had no Manner of Intereſt, but an Authority only, and the Eſtate was in the Son by Deſcent.

South *verſus* Allen, Buſh *verſus* Allen, 5 Mod. 63. 101.

So where the Teſtator was ſeiſed in Fee, and deviſed the *Rents and Profits to his Wife for Life, to be paid by his Executors into her Hands*, without the intermedling of the Huſband. The Queſtion was, Whether the Executors had any Intereſt by this Will? that is, Whether it was a Deviſe to them during the Life of the Wife? It was ſaid, That ſince the Statute of Wills, the Law never conſtrued a Freehold to paſs by ſuch Words without an apparent Neceſſity; and here is nothing given to them, and 'tis no Conſequence, that becauſe they *are to pay*, therefore they muſt

have

have no Eſtate in the Land; and of this Opinion was the Chief Juſtice *Holt*, *(viz.)* That the Executors had no Intereſt, for that would be to raiſe an Eſtate to them by Implication, to contradict an expreſs Eſtate deviſed to the Wife for Life; but two Judges were of another Opinion, *(viz.)* That the Intent of the Teſtator would be better fulfilled, if the Words carried an Intereſt to the Executors during the Life of the Wife, becauſe the Will being penned againſt the Huſband, he would, by ſuch Conſtruction, have nothing to do with the Land.

There are likewiſe ſeveral Caſes where the Deviſee hath not only an Authority, but an Intereſt *by the Will*; as a Deviſe that his Executor ſhould have the *Iſſues and Profits* of his Lands, *till his Son and Heir come of Age*, to the Intent that they ſhould pay his Debts and Legacies, and educate his Children, and made two Executors, and died; one of the Executors died, the Survivor made his Executor, and died; adjudged, That the Executor of the ſurviving Executor may poſſeſs himſelf of the Profits till the Son comes of Age, becauſe his Executor had an Intereſt by the Deviſe, and not only a bare Authority. Dyer 210. Poſtea, *Executor of Executor.*

So where the Teſtator was poſſeſſed of a Term for 99 Years of a Mannor, *&c.* and deviſed it to his Wife for Life, *to ſet, let, or make Eſtates out of it, in as ample Manner as he himſelf might if living, during the ſaid Term of her Life*, Remainder in Tail to his Daughter; the Widow made a Leaſe of a Tenement, Parcel of the Mannor for 99 Years, if three Lives ſhould ſo long live; it was objected this was not a good Leaſe againſt the Daughter, becauſe the Mother had no Authority by the Will to diſpoſe of any Part of the Eſtate Hele *verſus* Green, 2 Roll. Abr. 261. Stiles 315.

Eſtate but *during her own* Life; for if ſhe had, then ſhe might deſtroy the Remainder to the Daughter, which was never intended by the Teſtator; but adjudged, That the Leaſe was good; for if ſhe had no Authority but to make Leaſes for her own Life, then the latter Words of the Will were in vain, and void, therefore it ſhall be intended, that he gave this Power to his Wife, to make Leaſes for Years determinable upon Lives where it was cuſtomary ſo to do, and that by Poſſibility his Daughter might have it afterwards; but as this Caſe is reported by *Stiles*, the Court was divided.

Courthope *verſus* Heyman, Carter 25. So where a Deviſe was, That his Executor ſhould receive the *Profits and Iſſues* of his Land till his Children ſhould attain their reſpective Ages of 21 Years, the Reſidue to his Son when he ſhould be of that Age; the Executor made his Wife Executrix, and deviſed that ſhe ſhould diſpoſe the Profits according to the Will of the firſt Teſtator; adjudged good, becauſe it was an Intereſt veſted in the Executor.

Dyer 331. The Teſtator deviſed ſeveral Legacies, and the Reſidue of his Goods to his Wife, whom he made ſole Executrix to *diſpoſe for the Payment of his Debts*; ſhe married again, and that Huſband made his Executor, and died; adjudged, That the Widow, and not the Executor of the ſecond Huſband, ſhall have the Goods, becauſe ſhe had no Intereſt in them by the Will of her firſt Huſband as to herſelf, but only for Payment of his Debts.

Smith *verſus* Havens, Cro. Eliz. 252. But where the Deviſe was, That if *Elizabeth* his Wife thinks good to bring up his Children, and to find them Neceſſaries, that then ſhe ſhall have his Land till his Son comes of Age; the Wife

Wife died before the Son was of Age; adjudg'd, That this is not only a Confidence, but an Intereſt, and tied to a Condition to educate his Children.

Deviſe of Lands to his Daughter and her Heirs when ſhe comes to the Age of 18 Years, and that his *Wife ſhould take the Profits in the mean time, provided ſhe find the Daughter at School*; the Queſtion was, Whether this Truſt of the Education of the Daughter was a perſonal Limitation, ſo as the Wife ſhould not have the Profits any longer than ſhe educated the Daughter; and adjudged, That it was not, but a plain Term given to the Wife who married again, and it accrued to her Huſband; for the Education of the Child was not ſuch a particular Privity, but it might be performed by any one. Balder *verſus* Blackburn Hutt 36. Hob. 285. 1 Brownl. 79. S. C.

So where the Teſtator deviſed that *R. B.* ſhould take the *Rents and Profits* of his Lands for fifteen Years in Truſt to pay his Debts, and upon other Truſts, *&c.* and deviſed the Reſidue of his Goods and Chattels to the ſaid *R. B.* whom he made Executor; all the Debts were paid, and the Truſts performed, and there was an Overplus of the fifteen Years; it was inſiſted that it ſhould go to the Heir, for being raiſed out of the Inheritance, it ſhall attend it when the Truſt is performed; but decreed, That an *Intereſt* paſſed by this Deviſe, and that the Reſidue was in the Deviſee, who was Executor, and not in the Heir. Gore *verſus* Blake, 1 Ch. Rep. 98

Bail

Bail by Executor.

IT is generally true, that an Executor cannot be compelled by Law to put in Bail to an Action, becauſe he is ſued in *auter droit*; but there are ſome Caſes wherein 'tis otherwiſe, which I ſhall mention in their proper Places.

3 Jac. cap. 8. But firſt, I ſhall recite the Statute 3 *Jac. Cap.* 8. by which 'tis enacted, *That Execution ſhall not be ſtaid upon any Writ of Error, for reverſing a Judgment in an Action of Debt, or upon any Contract, unleſs the Plaintiff in Error enter into a Recognizance with two Sureties, to the Perſon who hath obtained ſuch Judgment, and in double the Sum to proſecute the Writ of Error with Effect, and to pay the Debt if the Judgment ſhall be affirmed.*

Goldſm. *verſus* Platt. 2 Cro. 350. About nine Years after the making this Statute, an *Action of Debt* was brought againſt an Executor, who pleaded *plene adminiſtravit*, and it was found for the Plaintiff, and Judgment accordingly. The Defendant brought a Writ of Error, and adjudged that he ſhould not put in Bail; for though the Words of the Statute are general, *viz.* that Execution ſhall not be ſtaid on a Judgment *in an Action of Debt*, yet that muſt be underſtood in an Action of Debt brought againſt the *Party himſelf* upon his Bond, or for his own Debt; but where the Judgment is Special, *viz.* that Execution ſhall be had *de bonis Teſtatoris*, and Damages only *de bonis Propriis*, 'tis not reaſonable that the Party ſhould find Sureties to pay the whole Condemnation Money out of his own Eſtate.

The

The ſame Point was adjudged in Sir *Henry Mildmay*'s Caſe. Mildmay's Caſe Cro. Car. 59. Lit. Rep. 2.

But if an * *Executor de ſon Tort* is ſued, he muſt put in Bail. * Lit. Rep. 5.

The ‖ Law was formerly the ſame, where a rightful Executor was ſued in an inferior Court, and afterwards removed the Cauſe by *Habeas Corpus*: But the Practice is now ‡ altered, becauſe if Bail ſhould be allowed in ſuch Caſes, it would encourage Actions to be brought againſt Executors in inferior Courts on Purpoſe to hold them to Bail. ‖ Rep. Lit. 81. ‡ Caſtle *verſus* Willet, Sid. 418. 1 Lev. 268.

So likewiſe where an ** Executor is charged with a *Devaſtavit*, he ſhall put in Bail. **Sid. 63. 3 Bulſt. 317.

As for Inſtance, a †† *Sci' Fac'* was brought againſt an Adminiſtrator upon a *Devaſtavit*, and a Judgment *de bonis Propriis*, he brought a Writ of Error, but was obliged to put in Bail before he had a *Superſedeas*; for though 'tis true, that he ſhall not put in Bail where the Charge is againſt him *de bonis Teſtatoris* only, becauſe the Suit is in *auter droit*; yet 'tis as true where the Judgment and Execution ſhall be *de bonis Propriis*, as in a falſe Plea, or in a *Devaſtavit*, there, upon a Writ of Error brought by an Executor, he ſhall put in Special Bail, becauſe the Suit in ſuch Caſes is occaſioned by his own Act, and ſo 'tis become a Suit againſt the Executor himſelf. †† Fitz-Williams *verſus* Moor, Sid. 368. 1 Lev. 245.

Baſtard. Deviſe to him. See *Intention.*

AS by the Statute 18 *Eliz. Cap.* 3. the Parents of Baſtard Children may be compelled to make Proviſion for them; ſo the Law allows,

* Perk Tit. Grant. 11, Tit. Deviſe 94.

† Bract. lib. 2. cap. 7.

that ſuch Parents by * Deed executed in their Life-time, or by their laſt † Wills, may give or deviſe their Land to their Baſtards.

‖ 6 Rep. 67.

The Year-Book 39 *Ed.* 3, 11. is cited in ‖ Sir *Moyle Finch's* Caſe, where 'tis held by *Thorp*, who was then a Judge of the *Common-Pleas*, and afterwards Lord Chancellor, that if a Baſtard is *commonly known and reputed to be the Son of* R. M. that a Remainder limitted to him by the Name of the Son of *R. M.* is good.

3 Leon 48.

Moor 10.

If a Man has ſeveral Children, and one of them is a Baſtard, Serjeant *Moor* tells us, the Law is clear, That if he grants all his Goods to his Children, the Baſtard ſhall take nothing by ſuch Grant; but he puts a *Quære*, Whether he ſhould not take by a Will of his reputed Father? But 'tis clear that he might take by his Mother's Will by that Name, becauſe he is known to be the *Child* of his Mother.

Dyer 323.

So a Deviſe to the Uſe of *Jane his Daughter*, and to the Heirs of her Body, which *Jane* was a Baſtard. My Lord *Dyer* puts a *Quare* to it; but it being referred to him and to Juſtice *Manwood*, they were both of Opinion, that the Law was clear this was a good Deviſe of the Land by the Intention of the Teſtator, to which Opinion Juſtice *Catline* and the other Judges agreed; ſo that *Quare* in *Moor*, Whether a Baſtard ſhall take by the Name of *Child* by the Will of his reputed Father, is well reſolved.

Bona

Bona Notabilia.

THE Perſon who at the Time of his Death, had Goods or Debts owing to him in any other Dioceſe, or peculiar Juriſdiction within that Province, beſides the Goods in the Dioceſe where he died, amounting to 5 *l.* or upwards, is ſaid to have *Bona Notabilia*; and in ſuch Caſe the Probate of his Will, or granting Adminiſtration, belongs to the Archbiſhop of the Province where he died; but by the *Canons of King* James, this ſhall not prejudice the Juriſdiction of thoſe Dioceſes, where by Compoſition or Cuſtom *Bona Notabilia* are valued at a greater Sum, as 'tis in *London*, where by Compoſition *Bona Notabilia* are to be to the Value of 10 *l.* *See* Repeal. Can. 92, 93. 4 Inſt 335.

Before thoſe *Canons*, it was not material to what Value the Good were in each Dioceſe, for let that be what it will, the *Metropolitan* had Juriſdiction; but now the Value muſt be 5 *l.* except Goods which the Party hath in a Journey; and the Regiſter of the inferior Court is to inform the Apparator of the Prerogative once a Month, what Executors or Adminiſtrators have been diſmiſſed to that Court for Incompetency of Juriſdiction below. 10 H. 7. 18.

And by the 93d *Canon*, the Prerogative Court is not to cite Men *ex Officio*, unleſs they know they left *Bona Notabilia*.

Now ſince *Bona Notabilia* may conſiſt in *Goods* and *Debts*, I ſhall mention ſuch Queſtions which have been made.

I. *Concerning Goods.*
II. *Concerning Debts.*
III. *Concerning the Juriſdiction of the Archbiſhops to grant Adminiſtration.*
IV. *Some Pleadings in Caſes where there are* Bona Notabilia.

Concerning Goods.

And I. *Concerning Goods*, the Queſtion was, Whether a *Leaſe* might fall under that Denomination? For if a Man hath Goods to the Value of 5 *l.* in one Dioceſe, and a *Leaſe* in another, this is a Chattel; yet if 'tis to that Value, it ſhall make *Bona Notabilia*, though 'tis not properly Moveables or Goods.

1 Roll. Abr. 909.

Concerning Debts.

II. *As to Debts* 'tis certain, That Money owing on *Bond* is a *Debt*; but then if the Party die Inteſtate in one Dioceſe, and leave the *Bond* at the Time of his Death in another Dioceſe, the Queſtion hath been to whom the Right of granting Adminiſtration doth belong, and 'tis held it doth belong to the Archbiſhop, becauſe the Debt is where the Bond is, and not where the Inteſtate *died*.

Bynn *verſus* Bynn, Cro. Eliz. 472. Noy. 54.

As for Inſtance, the Inteſtate died in *Lancaſhire*, leaving at the Time of his Death a Bond in *London*, the Biſhop of *Cheſter* granted Adminiſtration to *C.* who *releaſed* the Debt. The Archbiſhop granted Adminiſtration to the Plaintiff, who brought an Action of Debt againſt the Defendant upon this Bond, and he pleaded the *Releaſe*; but adjudged no Bar, becauſe the Debt is where the *Bond* was, and therefore the Prerogative Adminiſtration is good; 'tis true, if the Debt had been on a Contract, it follows the Perſon to whom 'tis due

due, and then the firſt Adminiſtration had been good.

So where one *Daniel* a *Goldſmith* had ſeveral Eſtates both in *England* and *Ireland*, and died Inteſtate at *Dunſtable* in *Bedfordſhire*, his Son obtained Letters of Adminiſtration of the Archbiſhop of *Dublin*, and *releaſed* a Debt due to his Father on a Bond from one *Luker*, a Merchant in *Waterford* in *Ireland*, ſuppoſing the Bond was made there; but it was made in *London*, and always remained there. The Widow afterwards obtained Adminiſtration of the Archbiſhop of *Canterbury*, and ſued *Luker* here on the Bond, who pleaded the *Releaſe*, but adjudged againſt him. Dyer 305.

To the like Purpoſe is the Caſe between * *Lunn* and *Dodſon*, *viz.* a Man enter'd into a *Bond* in *London*, and the Obligee carried it to *York*, and there died, Adminiſtration ſhall be granted by the Archbiſhop of *York*, where the *Bond* was at the Time of the *Death* of the Obligee; for it ſhall be accounted a Debt where it was when he died, and not where the Bond was made. The like was adjudged *Anno* 17 *Jac. viz.* That Debts on Bond ſhall make *Bona Notabilia*, nor where the Debtor or Debtee lives, but where the Bonds are. * Lunn *verſus* Dodſon, 1 Roll. Abr. 908.

By which Caſes it appears, that Debts owing to the Teſtator make *Bona Notabilia*, as well as Goods in Poſſeſſion; and that there is a Difference between Debts on Bonds and Specialties, and Debts on ſimple Contract. That *Bond-Debts* make *Bona Notabilia* where the *Bonds* or other Specialties are, at the Time of the Death of the Obligee, and not where he dwells or dies; but that Debts on ſimple Contract make *Bona Notabilia* in that County where the Debtor dwells. Trowbridge *verſus* Tayler, 1 Roll. Abr. 909

4 & 5 Annæ

By a late Statute 'tis enacted, That *the Salary, Wages, or Pay due to any Person for Work done in the Queen's Docks or Yards*, shall not be accounted *Bona Notabilia*.

Of a Prerogative Administration.

III. *As to the Jurisdiction of the Archbishop to grant Administration where there are Bona Notabilia* in several Dioceses; it is to be observed, that in former Times the several Ordinaries granted several Administrations, in Respect of the Goods of which Persons died possess'd in their several Dioceses; but this was found to be inconvenient, because the Creditors were compelled to bring several Actions against the respective Administrators; and therefore by Composition, or some other Agreement, which is now run out into a Prescription, the Right of granting Administration in such Cases, was vested in the *Metropolitan*.

1 Roll. Abr. 908. Postea.

If a Man hath *Bona Notabilia* in *England* and *Ireland*, and dieth Intestate, in such Case several Administrations shall be granted by the Archbishops of *Canterbury* and *Dublin*; but then he must have *Bona Notabilia* in several Dioceses in each of their Provinces, otherwise it ought to be granted by the Ordinary where the Goods are, and not by the Metropolitan. And for this, my Lord *Rolls* cites the Case of the *Irish* Merchant in *Dyer* 305. last mentioned.

1 Roll. Abr. 909.

So where a Man dies in one Diocese without any Goods there, but hath *Bona Notabilia* in another Diocese, those shall be sufficient to vest the Right of Administration in the *Metropolitan*, because the Ordinary where he died, is equally bound by the Law to take Care of the Goods, with the other Ordinary where the Goods actually were at the Time of his Death.

But

But the Reaſon given by my Lord *Coke* when he was Attorney General, in arguing *Bingham* and *Smeathwick*'s Caſe, was, becauſe the Perſon dying in the Province of the Archbiſhop, he hath a general Juriſdiction there; and he argued, that the Grant of Adminiſtration in ſuch Caſe is not void, but voidable by Sentence; for it was not like an Adminiſtration granted by a Biſhop of one Dioceſe, of the Goods of one dying Inteſtate in another Dioceſe; yet the Book tells us, That in both Caſes 'tis void, which is contrary to the Caſe in my Lord *Rolls*. Bingham *verſus* Smeathwick, Cro. Eliz. 457.

But it agrees with the Caſe in the *5th Report*, *viz.* if a Man die Inteſtate poſſeſſed of Goods in an inferior Dioceſe *only*, yet the Archbiſhop may grant Adminiſtration upon a Pretence of *Bona Notabilia*, and ſuch Adminiſtration is not void but voidable by Sentence, becauſe the Archbiſhop hath Juriſdiction over the whole Province; but if a Biſhop grant Adminiſtration when the Inteſtate had *Bona Notabilia*, ſuch Adminiſtration is meerly void, as well relating to the Goods in his own Dioceſe as elſewhere, becauſe he had no Juriſdiction out of his Dioceſe. 5 Rep. 30. Moor 693. contra. Vere *verſus* Jefferies. Moor 145.

About three Years before this Judgment, two Judges were of another Opinion, *viz.* That ſuch Adminiſtration is not void, becauſe *de mero jure* the Ordinary is to grant Adminiſtration; and that neither he, nor the Party to whom 'tis granted, may know that the Inteſtate had *Bona Notabilia*. Dunn's *Caſe*, 2 Leon 155.

If a Man dies, leaving * *Bona Notabilia* in both Provinces of *Canterbury* and *York*, there muſt be ſeveral Adminiſtrations; for an Adminiſtration granted in one Province is void as to Goods in the

* *But if in two Dioceſes in the ſame Province, there muſt be a Prerogative Adminiſtration.* 1 Salk. 39. Allinſon *verſus* Dickenſon, Hardres 216.

the other, becauſe they have diſtinct ſupreme Juriſdictions, and ſo it is in † *England* and *Ireland*.

† Shaw *verſus* Stoughton 2 Lev. 86. antea 118.

But if he hath Goods in ſeveral * *Peculiars*, the Archbiſhop of the Province, and not the Biſhop of the Dioceſe, ought to grant Adminiſtration.

* 1 Lev. 78

IV. As to the † Pleadings in Caſes where there are *Bona Notabilia*; if there are two Adminiſtrations, one granted by the *Metropolitan*, and the other by the Biſhop, the Prerogative Adminiſtration ought to be repealed, if ſuch had been granted where there was not *Bona Notabilia*.

† *Pleadings when there are* Bona Notabilia

‖ Allen *verſus* Andrews, Cro. Eliz. 283, 315, 457.

ſſ. The ‖ Archbiſhop granted Adminiſtration to the Defendant, and in an Action brought againſt him the Plaintiff had Judgment, and a *Sci' Fac'* to ſhew Cauſe why he ſhould not have Execution; to which the Defendant pleaded, That the Inteſtate died in *London*, and had not *Bona Notabilia*; and that after the Judgment obtained againſt him, the Biſhop of *London* granted Adminiſtration to his Wife; and upon Demurrer it was adjudged, That this Plea came too late, for the Defendant ought to have repealed the Prerogative Adminiſtration, before he could avoid the Judgment againſt him by ſuch Plea.

The Biſhop of *Rocheſter* granted Adminiſtration to one, who brought an Action of Debt againſt the Defendant, who pleaded, that before the Adminiſtration granted to the Plaintiff, the Archbiſhop granted Adminiſtration to him, becauſe the Inteſtate had *Bona Notabilia*, but did not ſhew how much in certain, or to what Value, which he ought to have done; but yet the Adminiſtration is not void, but voidable.

8 Rep. 135. *Sir* John Needham's *Caſe*.

Indebitatus Aſſumpſit againſt an Executrix, who pleaded in Abatement, that her Huſband died Inteſtate, but *did not ſet forth in what Dioceſe*

ceſe, and that he had *Bona Notabilia* in ſeveral Dioceſes, *but did not ſhew where*, and that Adminiſtration was granted to her by the Prerogative Court, *&c.* ſo that ſhe ought to be ſued as Adminiſtratrix, and averred her Plea; but upon a ſpecial Demurrer it was held ill; for where an Adminiſtratrix, who is Defendant, pleads either in Bar or Abatement, ſhe muſt ſet forth *in what Dioceſe her Huſband died*, and *where* he had *Bona Notabilia*, that it may appear the Prerogative Adminiſtration was well granted. *In* Read's *Caſe*, 5 Rep. 33.

Debt againſt the Defendant as Executor to *John White*, who pleaded, that the ſaid *John White* did make a Will, but not the Defendant Executor, but that he had *Bona Notabilia* in ſeveral Dioceſes, and thereupon the Archbiſhop of *Canterbury* granted Adminiſtration to him, and concluded in *Bar*; and upon Demurrer the Plea was adjudged ill, becauſe it was a Plea in *Abatement* only, and concluded in Bar. Juſtice *verſus* White, 1 Mod. 239

The moſt certain Way of pleading in theſe Caſes is, that the Inteſtate had *Bona Notabilia* in ſeveral Dioceſes within the Province of *Canterbury*, (*viz.*) at *Weſtminſter* in the County of *Middleſex* and Dioceſe of *London*, and at St. *Edmond's-Bury* in the County of *Suffolk* and Dioceſe of *Norwich*, and that Adminiſtration was granted to him by the Archdeacon of *Sudbury*. Scarpe *verſus* Young, 2 Lutw.

Adjudged, That where there are *Bona Notabilia* in two Dioceſes in the ſame Province, there muſt be a Prerogative Adminiſtration, but where there are *Bona Notabilia* in one Dioceſe in one Province, and in another Dioceſe in another Province, there muſt be two Prerogative Adminiſtrations. Burſtowe *verſus* Ridley, 1 Salk. 39.

Bonis non, &c. See *Adminiſtrator de Bonis non.*

Bonis

Bonis Propriis & Teſtatoris.

See *Devaſtavit.* See *Aſſets.* See *Co-Executors. plene Adm.*

AN Executor may make himſelf chargeable to anſwer the Demand out of his own Goods in ſeveral Reſpects.

And firſt by *Omiſſion*, as where there is a *Judgment* againſt the Teſtator, and the Executor is ſued on a *Bond*, and having not enough to ſatisfy the *Judgment*, doth not plead it in Bar to the Action brought on the Bond, but ſuffers the Plaintiff to recover; in ſuch Caſe he muſt ſatisfy the Judgment out of his own Eſtate.

By *Commiſſion*, and this may be done by ſeveral Acts, as,

(1.) *By paying* Legacies *before* Debts, *where there is not enough to ſatisfy both.*
(2.) *By pleading a* falſe Plea.
(3.) *By* ſelling *the Goods of the Teſtator.*
(4.) *By* waſting *the Goods of the Teſtator or Inteſtate.*
(5.) *By bringing a* Writ of Error, *on which the Judgment is affirmed.*

Paying Legacies before Debts. 21 Ed. 4. 21.

(1.) *By paying* Legacies *before* Debts, *where there is not enough to ſatisfy both*; and for this there is an expreſs Authority in the Year-Book, *viz.* That the Executor ſhall be charged *de Bonis Propriis* where he had not Aſſets to pay both.

11 H. 7. 12. *Vide* Dyer, 32.

The Law is the ſame where he payeth *Debts by ſimple Contract* before *Debts upon Bond*, having *Notice* of ſuch Debts upon Specialty.

(2.) If

(2.) If an Executor pleads *ne unques Executor*, and 'tis found againſt him, the Judgment ſhall be *de Bonis Teſtatoris*; and if he hath none, then *de Bonis Propriis*, becauſe he eſtrangeth himſelf from the Teſtator, and by his Falſity and Folly hath made himſelf liable. *By pleading a falſe Plea.* 11 H. 4. 5. 9 H. 7. 15.

But if he hath any Goods of the Teſtator, then the Judgment ſhall be *Bonis Teſtatoris*, for ſo much of the principal Debt, and Damages *de Bonis Propriis* for the Reſidue. Bridgman *verſus* Lightfoot 2 Cro. 671.

* So if he plead *plene adminiſtravit*, and the Jury find Aſſets; and upon a *Fi' Fa'* the Sheriff retorns *nihil*; thereupon a Special *Fi' Fac'* ſhall iſſue *de Bonis Teſtatoris & ſi conſtare poterit*, that the Goods are *eſloined* then *de Bonis Propriis*, and not a *Fi' Fac' de Bonis Propriis*. Firſt, ‡ becauſe that Plea is no *Bar* to the Action though *falſe*. * 2 Ed. 4. 4. Street *verſus* Wiſe, 1 Roll. Abr. 930. S. P. ‡ 9 H. 6. 9. Fitz-Executor 9.

For if he plead that which will be a perpetual Bar to the Action, and of which he might have perfect Notice; and 'tis found againſt him, the Judgment ſhall be *de Bonis Teſtatoris*, and if he hath none, then *de Bonis Propriis*; as if he plead, That the Plaintiff gave him a † *Releaſe*, or that he ‖ never was Executor, or adminiſtred as Executor; for theſe are Things which fall under his own Knowledge, and are *falſe*. 34 H. 6. 22. † 9 H. 7. 15. ‖ 2 Cro. 671.

But 'tis otherwiſe where he pleads *non eſt factum Teſtatoris*, or a *Releaſe* given to the *Teſtator* himſelf; for though that proves falſe, the Judgment ſhall be *de Bonis Teſtatoris*, becauſe the Executor cannot have a perfect Knowledge of the Matter. So for a Breach of Covenant, though actually broken in the Time of the Executor, he ſhall be chargeable *de Bonis Teſtatoris*, becauſe 'tis in Reſpect of the Deed of the * Teſtator. 6 Ed. 4. 1. * Caſtillion *verſus* Smith, 2 Cro. 671. Hutt 35.

† *Anno*

† Bracebridge *verſus* Baſkervil, 3 Leon 67. 1 And. 150

† *Anno* 29 *Eliz.* there was a very nice Diſtinction made concerning a Plea of what falls under the Defendant's *Knowledge*, and is altogether *falſe*, and of a Plea which is *falſe*, but not altogether ſo. As for Inſtance, the Defendant pleaded, that the Plaintiff *recovered* againſt him in a former Action, and ſets forth the *Record*, and the Plaintiff replied, that the *Recovery* was by *Covin*, and ſo it was found; in ſuch Caſe the Judgment ſhall be *de Bonis Teſtatoris*, becauſe the Plea was true in Part, for there was a *Record* of ſuch *Recovery* though the Plaintiff had avoided it.

3 H. 6. 4. 21 H. 6. 40. Fitz. Executor 2.

Debt againſt Executor for 40 *l.* who pleads *plene Adminiſtravit*, and 'tis found againſt him to the Value of 20 *l.* and Damages to 5 *l.* the Plaintiff ſhall have Judgment as to the 20 *l.* *de* ‖ *Bonis Teſtatoris*, and as to the Damages *de Bonis Propriis*, and a *Caſa* for the Damages.

‖ Newman *verſus* Rabington, Godb. 178. S. P.

‡ Morgan *verſus* Sock, Yelv. 219. 1 Bulſt. 187

Debt againſt an Adminiſtrator, who ‡ pleaded, That before Action brought, the *Adminiſtration* was *revoked*, and committed to another, he having then Aſſets in his Hands to the Value of 200 *l.* which he had delivered over to the new Adminiſtrator. The Plaintiff replied, That it was by *Covin*, and ſo it was found, and thereupon he had Judgment *quod recuperet debitum de bonis Teſtatoris*; and upon a Writ of Error brought, it was objected, That the Judgment ſhould not be abſolute *de Bonis Teſtatoris*, but conditional *ſi tantum habuit in manibus*, but it was held that the Judgment was good.

Debt againſt an Executor of *B. G.* Executor of *J. D.* upon a Bond of the firſt Teſtator. The Defendant pleaded, that the ſaid *J. D.* was indebted to him in 100 *l.* and that Goods to that Value came to his Hands as Executor, which he detained,

detained, *&c. ultra quod*, he had not Aſſets. The Plaintiff replied and averred Aſſets, upon which they were at Iſſue, and it was found that he had Aſſets; adjudged, that he ſhould recover againſt the Defendant *de Bonis* of the firſt Teſtator in his Hands, and Damages *de Bonis Propriis*; and if the Sheriff ſhould return *nulla Bona* of the firſt Teſtator in the Hands of the Defendant, he muſt return a *Devaſtavit* in him, and not in the firſt Teſtator, becauſe 'tis found by Verdict that he had Aſſets, and the Sheriff made ſuch Return, and thereupon Execution was *de Bonis Propriis*. 2 Ella. Dier. 185. Sir John Chicheſter's Caſe.

Debt againſt an Executor on a Bond of the Teſtator, conditioned to deliver a Load of Hay to the Plaintiff every Year at *Michaelmas* during his Life. The Defendant pleaded, That he and his Teſtator had performed the Condition, and it was found they had not. It was the Opinion of my Lord *Dyer*, that the Plaintiff ſhould have Judgment *de Bonis Propriis*, as if the Defendant had pleaded a Releaſe to himſelf which was not true. Moor 69.

Debt upon Bond againſt *Baron* and *Feme* as Adminiſtratrix, the Defendant pleaded Payment by the *Feme*, after the Death of the Inteſtate, and it was found againſt him, and the Judgment was *quod recuperet* againſt them *de Bonis Teſtatoris ſi tantum habent in manibus, & ſi non pro miſis' de Bonis Propriis*, and held well enough; for though the Plea is falſe, yet the Huſband was a Stranger to the Inteſtate, and might not know whether the Wife had paid it to the Plaintiff; and 'tis not like *plene adminiſtravit*, which, if found falſe, the Judgment ſhall be *de Bonis Propriis*, becauſe 'tis falſe upon his own Knowledge. Johns verſus Adams, 2 Cro. 191. 2 Cro. 617.

Debt

Chapman *verſus* Gall, 2 Lev. 22.

Debt againſt an Executor, who pleaded *plene adminiſtravit*, and Judgment againſt him, which was entred generally, when it ought to be *de Bonis Teſtatoris ſi, &c. & ſi non de Bonis Propriis.*

By ſelling the Teſtator's Goods. 9 H. 6. 57. Fitz-Executor 7.

(3.) If an Executor *ſell* the Teſtator's Goods, pending the Action, and before Judgment, he ſhall be charged *de Bonis Propriis*; but a Sale after Judgment is void.

19 H. 6. 49.

Therefore where Judgment was obtained againſt an Executor, and upon a *Fi' Fac'* brought, the Sheriff returned that he had ſold the Goods of the Teſtator, and converted them to his own Uſe; in ſuch Caſe a *Sci' Fac'* ſhall be againſt him *de Bonis Propriis.*

By waſting the Teſtator's Goods.

(4.) The Law is the ſame where the Executor waſted the Goods, as if there is a Judgment againſt him; and upon a *Fieri Fac'* brought, the Sheriff returns a *Devaſtavit*, there ſhall be a *Sci' Fac'* againſt him *de Bonis Propriis*; which * *Sci' Fac'* would not lay, unleſs the Sheriff had returned a † *Devaſtavit.*

* 11 H. 4. 70. Fitz-Executor 57.

†Williams *verſus* Roberts, Noy 7.

So where ‖ Debt was brought againſt two Executors, one of them confeſſed the Action, and the Judgment was, that the Plaintiff ſhall recover his ‡ Debt *de Bonis & Catallis* of the Teſtator in both their Hands, and thereupon a *Fi' Fac'* iſſued againſt them both; and the Sheriff returned, that at that Time they had *nulla Bona*, but that one of them had Goods of the Teſtator to the Value of the Debt, and that he waſted them *ante receptionem Brevis*; and upon this Return a *Sci' Fac'* iſſued againſt him alone, to have Execution *de Bonis Propriis*, and the Plaintiff had Judgment accordingly.

‖ *See* Merchant *verſus* Driver. ‡ Dyer 210.

So where there was a Judgment againſt an Executor to recover 60 *l. de Bonis Teſtatoris*, and 6 *l.* for

for Damages, and *ſi non, &c. de Bonis Propriis*, and thereupon a *Fi' Fac'* was brought againſt him, and the Sheriff returned *nulla Bona*. And afterwards, upon a Suggeſtion that he had *waſted* the Goods in *London*, a ſpecial *Fi' Fac'* was directed to the Sheriff, who, upon an Inquiſition taken, returned *quod Bona Teſtatoris devenerunt*, to the Hands of the Executor after the Death of the Teſtator, but that he converted them to his own Uſe. Then there was a *Sci' Fac'* iſſued againſt him, to ſhew Cauſe why the Plaintiff ſhould not have Execution *de Bonis Propriis*; to which the Defendant pleaded, that *quoad* the 6*l.* Damages the Plaintiff ought to have Execution, but *quoad* the 60*l. plene adminiſtravit*; and upon Demurrer this was held a good Plea; for he ſhall not be concluded by the Return and Inquiſition of the Sheriff, becauſe 'tis not directly in Purſuance of his Writ; but of a Matter collateral; as if upon a *Capias* the Sheriff return a *Reſcous*, there may be an Averment againſt ſuch a Return; ſo in this Caſe, the Return is the Saying of the Inquiſition.

Gibſon *verſus* Brook, Cro. Eliz. 859. 886. Owen 132.

About two Years afterwards, *Pettifer*'s Caſe was argued and adjudged in like Manner, *viz.* there was Judgment againſt two Executors to recover *de Bonis Teſtatoris*, and a *Fi' Fa'* to the Sheriff to levy the Debt, who returned *nulla Bona*; thereupon, on a Suggeſtion on the Roll, that the Defendant had *waſted* the Goods, a Writ was directed to the Sheriff, and the Inquiſition being taken by the Jury, he returned that they had *waſted* the Goods; then a *Sci' Fac'* iſſued againſt him, to ſhew Cauſe why the Plaintiff ſhould not have Execution *de Bonis Propriis*; but to this *Sci' Fac'* the Defendant did not plead, as he did in *Gibſon*'s

Pettifer's *Caſe*, 5 Rep. 32. Co. Ent. 270 *b.*

Viz. a Teſtatum, *that the Goods were eſloined.*

Gibſon's Caſe mentioned before; for upon the Sheriffs return of *nihil*, the Plaintiff had Judgment, yet it was reverſed upon a Writ of Error, becauſe upon *nulla Bona* returned, the Plaintiff ought to have a ſpecial *Fi' Fac'* to the Sheriff to levy the Debt *de Bonis Teſtatoris*; and that if *ſibi conſtare poterit*, that the Executor had *waſted* the Goods, then *Bonis Propriis*, and this was the uſual and moſt reaſonable Courſe. For if the Sheriff make a falſe Return, that the Defendant had *waſted* the Goods when he had not, an Action lies againſt him; but if he makes a falſe Return upon ſuch an Inquiſition, the Party is without Remedy.

Mounſon *verſus* Bourne, Cro. Car. 518. Jones 417. 1 Roll. Abr. 930.

And therefore this Inconvenience was prevented *Anno* 14 *Car. viz.* Sir *William Mounſon* marry'd *Margaret* the Executrix of the Earl of *Nottingham*, and one *Bourne* brought an Action of Debt againſt them in *London*, and had Judgment; thereupon a *Fi' Fac'* iſſued to the Sheriff, who returned *nulla Bona Teſtatoris*, and for the Coſt *nulla Bona*. Afterwards the Plaintiff, upon a *Teſtatum* that the Goods were eſloined, procured a new *Fi' Fa'*, reciting the Judgment and the former Writ, and the Return thereof, *& quod Teſtatum exiſtit*, that the Defendants had Goods ſufficient, and had eſloined and ſold them; wherefore the Sheriffs were commanded, that by Inquiſition *vel alio modo*, *&c.* they ſhould enquire if the Defendants had eſloined the Goods, and if it was ſo found, that then *Scire faciant*, the Defendants to be in Court *in Octab' Mich'* to anſwer the Waſte done by them, and to ſhew Cauſe why Execution ſhould not be awarded *de Bonis Propriis*, the Sheriffs retorned the Inquiſition, finding a Sale of Goods made by the Defendants, and that *Scire fecerunt* the ſaid Defendants who appeared and demurred

Stiles 372.

demurred to the Writ; and the Court adjudging the Writ good, and that the Defendants ſhould anſwer, they imparled, and Judgment was given againſt them by Default, and that the Plaintiff ſhould have Execution *de Bonis Propriis*, which was affirmed on a Writ of Error; and this differs from *Pettifer's* Caſe, for there Judgment was given upon a *nulla Bona* retorned, but here after a *Scire feci*.

So in Debt againſt Huſband, and Wife as Adminiſtratrix to her firſt Huſband, and Judgment againſt them, and upon a *Fi. fa.* the Sheriff returned *nulla Bona* of the Inteſtate; and upon a Suggeſtion that they had *waſted* the Goods, there was another *Fi. fa.* iſſued againſt them, with a Clauſe in the Writ, *ſi ſibi conſtare poterit per Inquiſitionem*, that they had *waſted* them, then *Scire facerit* the ſaid Defendants to ſhew Cauſe why Execution ſhould not be done *de Bonis Propriis*, as the Courſe is, and the Sheriff retorned that the Jury had found, that the Wife had to the Value of 100*l.* of the Inteſtate's Goods which ſhe had waſted in her Widowhood, and that the Huſband had not waſted any, yet Execution was awarded *de Bonis Propriis* of the Huſband and Wife, becauſe he is to be charged for the Waſte done by his Wife. Knight *verſus* Hilton; Cro. Car. 603. 1 Roll. Abr. 931.

(5.) *Laſtly*, If Executors bring any **Writ of Error*, and the Judgment is not reverſed, they ſhall be chargeable *de Bonis Propriis*. *By bringing a Writ of Error.* *Litt. Rep. 53.

Upon the whole Matter it is to be obſerved, that an Executor is never charged *de Bonis Propriis*, but where he doth do ſome Wrong, as may be ſeen in all the Caſes and Inſtances before mentioned; and in many of them there is a Neceſſity, that the Judgment ſhould be entered not generally, but conditionally, *viz. de Bonis Teſtatoris & ſi non*,

non, &c. de Bonis Propriis, to ſhew which there is one Caſe more.

Nelſon verſus Powell, 2 Roll. Rep. 400.

ſſ. The Teſtator recovered in an Action of Debt, and died, and his Executor acknowledged Satisfaction, afterwards the Judgment was reverſed, and Reſtitution was awarded *de Bonis Teſtatoris, & ſi non, de Bonis Propriis*, now if it ſhould have been *de Bonis Teſtatoris* only, then the Man who had paid the Money upon an erroneous Judgment, might be in Danger of loſing it, if upon the Reverſal of that Judgment, the Executor ſhould not have Aſſets to ſatisfy the Money ſo paid, and it would be very hard upon the Executor to award that he ſhould make Reſtitution *de Bonis Propriis* alone; becauſe the Debt which his Teſtator recovered in his Life-time, was Aſſets (after his Death) in the Hands of the Executor, and liable to his Debts, which the Executor is bound to pay ſo long as the Judgment is in Force; and therefore, if upon the Reverſal of an erroneous Judgment, he ſhould not have Aſſets of the Teſtator's Eſtate to make Reſtitution, it would be hard to charge him *de Bonis Propriis*, which ought not to be but where he hath done ſome Wrong.

But yet there are ſome Caſes where the Judgment ſhould be,

(1.) *De Bonis Propriis tantum.*
(2.) *De Bonis Teſtatoris tantum.*

The Judgment ſhall be *de Bonis Propriis*,
1. *Where the Defendant waſtes or conceals the Goods.*
2. *Upon his expreſs Promiſe to pay*, &c.

Sci' fa'

(1.) *Sci' fa'* to have Execution againſt the Defendant (Adminiſtrator of one *Row*) *de Bonis Propriis*, upon an Inquiſition retorned, that the ſaid Defendant *habuit bona & catalla in manibus ſuis* of the Inteſtate to the Value of the Debt and Damages recovered by the original Judgment, and that *Bona & Catalla illa* (to the Value of the Debt, &c.) *vendidit & elongavit & ad uſum ſuum proprium convertit*, and Iſſue was taken thereupon, and found for the Plaintiff; it was objected, That the Plaintiff could not have Execution *de Bonis Propriis*, becauſe there was no *devaſtavit* found or in Iſſue; for the Iſſue which was tried might be true, and yet the Defendant not guilty of *Waſting*, for he may convert the Goods to his own Uſe upon Payment of a Debt to that Value: But it was adjudged for the Plaintiff; for if he had paid to the Value, &c. then the Property is altered, and ſo he could not *convert* his own Goods.

Merchant *verſus* Driver, 1 Sid. 412. 1 Sand. 306 1 Vent. 20.

But a better Reaſon was given by my Lord *Hales* in *Blackmore* and *Mercer*'s Caſe, That tho' the Defendant had not *actually waſted* the Goods, but had them in *Specie* in his Hands, and kept them * ſo *privately*, that the Sheriff could not find them to levy the Debt due to the Plaintiff; in ſuch Caſe 'tis reaſonable that he ſhould anſwer *de Bonis Propriis*.

Blackmore *verſus* Mercer, 2 Sand. 402 1 Vent. 221.

* *See* Yate *verſus* Alexander, God. 285.

About 8 Years afterwards this Caſe happened: *Iſſ.* † The Inteſtate entered into a Recognizance to *Norden* for the Payment of 800 *l.* and one *Hope* as *Executor de ſon Tort*, poſſeſſed himſelf of the ſaid Inteſtate's Goods; afterwards Adminiſtration was granted to *Levett*, who ſued *Hope*, and pending the ſaid Suit, they entered into Articles, that *Levett* ſhould diſcharge *Hope* as he was *Executor de ſon Tort*, and that *Hope* ſhould pay *Levett* 650 *l.*

† Norden *verſus* Levett, 2 Lev. 189. Jones 88.

which he covenanted to pay, but had not done it; and thereupon *Levett* brought his Action againſt *Hope* to recover the Money, *&c.* and upon a *Sci. fa.* brought by *Norden* againſt *Levett*, ſuggeſting, That *he had waſted the Goods, and had ſold them or converted them to his own Uſe*, Iſſue was taken thereupon, and all this Matter was found ſpecially; and it was inſiſted for *Levett*, That he had not *waſted*, *&c.* for he had done no Wrong, but had taken the moſt effectual Courſe to ſecure the Inteſtate's Eſtate; and the Security which he had taken, was not like a Bond taken to diſcharge a Debt due on Contract, becauſe the Debt was certain, as well by the Contract as by the Bond: But in this Caſe the Debt was uncertain before the Security taken, for the Suit againſt *Hope* was only to recover Damages, which were uncertain, and left to the Jury; but by the Covenant the Debt was made certain, and there being no Satisfaction yet made by the Payment of the Money to *Levett*, the Matter reſted wholly in this Agreement, and by Conſequence there was no Alteration of the Property of the Goods. Upon the firſt Motion the Court ſeemed to be of this Opinion, but afterwards adjudged, That the Property of the Goods was altered by this Agreement, and *Levett* having accepted the Covenant, it ſhall operate as a Sale to him and 'tis Aſſets in his Hands preſently, tho' by his own Acceptance the Money was to be paid at a Day to come, and he ſhall anſwer *de Bonis propriis.*

(2.) *If an Action is brought againſt an Executor upon his own Promiſe, the Judgment ſhall not be general, but* de bonis propriis tantum.

Howell *verſus* Trevanian, Cro. Eliz. 91. 1 Leon. 93.

‖ So where the Inteſtate was indebted for Goods, and Adminiſtration was committed to his Widow,

‖ Wheeler *verſus* Colyer, Cro. Eliz. 406. Moor 419. who

who promiſed, That if the Plaintiff would deliver unto her more Goods, ſhe would pay for the Whole, and in an Action brought againſt her for the Whole, upon *Non Aſſumpſit* pleaded, the Plaintiff had Judgment and entire Damages: But it was arreſted, becauſe the Whole could not be joined in one Action; for the Judment for the Inteſtate's Debt ought to be *de Bonis inteſtati*, and for her own Debt *de bonis propriis*, as 'tis reported by Serjeant *Moor*; but Juſtice *Croke* reports it otherwiſe, who tells us, That was only the Opinion of the Chief Juſtice *Popham*, and that all the other Judges were againſt him, becauſe the Action is founded upon her own Promiſe, 'tis a Charge upon her by her own Act, and therefore the Judgment ſhall be *de bonis propriis tantum.*

So where the Plaintiff declared, That the Inteſtate was indebted to him, and that the Defendant being his Adminiſtrator promiſed to pay in Conſideration, That at his Requeſt the Plaintiff would accompt with him, which he did, and being found in arrear, promiſed to pay, *&c.* the Plaintiff had Judgment to recover *de bonis propriis*, and held good, for he was not obliged to accompt with the Adminiſtrator, and what he did was at his Requeſt, and here being an expreſs Requeſt to accompt, and an expreſs Promiſe to pay, 'tis as much as a Promiſe to pay in Conſideration of Forbearance, and that will be ſufficient to charge an Executor *de Bonis propriis*, tho' a bare Accompt would not without a *Requeſt* to accompt. Hawes verſus Smith, 2 Lev. 122.

(2.) In the Caſes following the Judgment was *de Bonis Teſtatoris tantum.* *de Bonis Teſtatoris tantum.*

Dyer 314. *ſſ.* Leſſee *covenanted* for himſelf, his Executors, *&c.* to repair and uphold the Houſe, which was afterwards burnt by the Negligence of the Executor, and in an Action brought againſt him the Judgment was *de bonis Teſtatoris tantum*, and the Reaſon is given by my Lord *Hobart* in the like Caſe, becauſe the Action is brought upon the *Covenant* of the Teſtator, which binds his Executor as repreſenting him.

Collins *verſus* Thorogood, Hob. 188.

Caſtellion *verſus* Smith, Hob. 283. So where the Teſtator gave *Bond* for Performance of *Covenants*, and *Debt* was brought upon that *Bond* againſt his Executor, and the Breach aſſigned, was for plowing up marſh Ground by the Executor himſelf, which his Teſtator was prohibited to do by the Leaſe, yet the Judgment ſhall be *de Bonis Teſtatoris tantum*, tho' the Breach of the *Covenant* was by the Act of the Executor, becauſe he is not chargeable if he hath not Aſſets.

Bull *verſus* Wheeler, 2 Cro 647. Palm. 314. The ſame Point was adjudged in an *Action of the Debt* againſt an Executor, for Performance of *Covenants* in a Leaſe made to his Teſtator, and the Breach aſſigned for not repairing in the Time of the Executor himſelf after the Death of the Teſtator; and the Reaſon of the Judgment was, becauſe the Executor is chargeable in an Action of Debt by the Covenant made by his Teſtator, and therefore ſhall be charged *de Bonis Teſtatoris tantum*, * but he is chargeable for a Breach of Covenant only in reſpect of Aſſets of the Teſtator in his Hands.

* *Dean and Chapter of* Briſtol *verſus* Gulſe, 1 Sand. 112.

‖ Judgment againſt the Teſtator who died, and a *Sci. fa.* was brought againſt his Executor, who pleaded *ne unques* Executor, nor ever adminiſtred as Executor, and it was found againſt him; yet the Judgment was *de Bonis Teſtatoris tantum*, becauſe the Execution muſt relate to the Judgment,

‖ Litt. Rep. 53.

ment, and the *Sci. fa.* was brought only to ſhew Cauſe why the Plaintiff ſhould not have Execution upon the firſt Judgment.

So where Debt and Damages were recovered againſt the Teſtator, and a *Sci. fa.* againſt 4 Perſons who were his Executors, they all pleaded *plene Adminiſtraverunt*, and the Jury found 100 *l.* Aſſets in the Hands of one, and 40 *l.* Aſſets in the Hands of another, and that the other two had none; yet the Judgment ought to be againſt all *de Bonis Teſtatoris*, becauſe they are ſued as Executors, and they had acknowledged themſelves ſuch by pleading. Nevell *verſus* Delabar, Cro. Car. 286 1 Roll. Abr. 929.

But if an Action is brought againſt two Executors, and they plead ſeverally by ſeveral Attornies *plene Adminiſtravit*, and the Jury find that one hath Aſſets and the other none, Judgment ſhall be againſt him alone who hath Aſſets. Bellew *verſus* Inckleden, 1 Roll. Abr. 929.

Laſtly, I ſhall conclude this Title with ſome Caſes concerning pleading, (*viz.*) In Trover the Plaintiff as Executor declared, That he was poſſeſſed of 40 *l. ut de Bonis ſuis propriis*, and loſt them, and that the Defendant found and converted them to his own Uſe, *in retardationem Executionis Teſtamenti*, there was a Judgment for the Plaintiff; and upon a Writ of Error brought, it was objected that it was contradictory to alledge, That the Plaintiff could loſe his *proper Goods*, in *retardationem Executionis Teſtamenti*, but adjudged, That he is poſſeſſed of the Teſtator's Goods, *ut de Bonis ſuis Propriis*, and ſo may declare; and that the Converſion is, *in retardationem*, &c. and that at the moſt the Words are but ſurpluſage. Rivers *verſus* Godſkirt, Cro. Eliz. 168.

Leſſee for Years paying an yearly Rent, made his Wife Executrix and died, ſhe *aſſigned* the whole Term, and the *Aſſignee* covenanted to *repair*, and

afterwards made *Mary* his Wife Executrix and died, an Action of Covenant was brought againſt her, and the Breach aſſigned *in not repairing*, ſhe pleaded a Judgment obtained againſt her, and that ſhe had not Aſſets *ultra*, &c. and upon Demurer to this Plea it was held good, becauſe the Defendant was charged as *Executrix of the Aſſignee*, and not as *Aſſignee* herſelf, and therefore was liable onely to anſwer *de Bonis Teſtatoris*.

Buckley *verſus* Pitt, 1 Salk. 316. *See* Tilney *verſus* Norris.

Capias againſt two Executors, the Sheriff as to one of them returned *non eſt inventus*, the other appeared, and Judgment was obtained againſt both; whereupon he who appeared brought a Writ of Error, and concluded *ad damnum ipſius*, *&c.* adjudged that this Judgment ſhall be againſt both *de Bonis Teſtatoris*, and that in the Writ of Error both muſt join.

Rouſe *verſus* Ethering-ton. 1 Salk. 313.

Leſſee for Years covenanted to repair and died, the Leſſor brought an Action of Covenant againſt the Adminiſtrator, and ſhewed that *Status de & in præmiſſis* came to the Defendant, who entred, and the Premiſſes were in decay and not repaired; it was inſiſted againſt the Defendant, that this Covenant runs with the Land, and that tho' he (the Defendant) was ſued as Adminiſtrator, yet he is charged as Aſſignee, and therefore ſhall be liable *in proprio jure* to repair, but adjudged that it ſhall be *de Bonis Teſtatoris*.

Tilney *verſus* Norris. 1 Salk. 309. *See* Buckly *verſus* Pitt.

Caveat.

1. WHere the Right of Adminiſtration may come in Queſtion, 'tis uſual for the Party to enter a *Caveat*, which ſtands in Force for 3 Months, as Dr. *Talbott* affirmed in his Argument in *Hitchins* and *Glover*'s Caſe.

2 Rol. Rep. 6.

2. And

2. And if after ſuch *Caveat* entered the Ordinary ſhould grant Adminiſtration, 'tis void by the Canon Law, but not by the Common Law; becauſe a *Caveat* is only for the Benefit of the Ordinary to prevent his doing any Wrong, it doth not preſerve *jus illæſum*, ſo as to make all ſubſequent Proceedings void, becauſe 'tis only the Act of the Party, and at his Inſtance, and doth not come from any Superior: And therefore an Adminiſtration granted after a *Caveat* entered is not void by our Law; and 'tis ſo far from being void, That my Lord *Coke* in the Caſe of *Hutchins* and *Glover* before mentioned, declared his Opinion, That the Common Law takes no manner of Notice of a *Caveat*, to which *Dodderige* agreed; ſo that it ſeems to be a meer cautionary Act for the better Information of the ſpiritual Judge, to which the temporal Courts have no Regard. 1 Roll. Rep. 191. 2 Cro. 463.

See tit. Repeal,

Charitable Uſes, Deviſe.

WHere Lands, Rents, Goods or Money are given or deviſed to any of the Purpoſes following, 'tis accompted a Gift or Deviſe to a charitable Uſe.

I. *Aged* and poor People to maintain.

Apprentices to bind out.

Baſtards to relieve; becauſe, like Orphans, they have no Parents.

Bridges to repair for publick Paſſage.

Cauſeways to repair.

Churches to build or repair.

Correction-houſe, (viz.) finding a Stock to maintain it.

Decayed

Decayed Perſons to relieve, (*viz.*) Bankrupts who are in Priſon; thoſe who are decayed by the Negligence of Servants, or by Fire, or other Loſſes.

Havens
Highways } to repair.

Mariners ſick or wounded to relieve.

Marriage of poor Maids.

Orphans to maintain, *viz.* thoſe who are Poor.

Ponds common for watering Places, to make.

Poor, to relieve.

Ports to repair, (*viz.*) ſuch as are for Safety of *Ships*.

Preaching Miniſter, to maintain.

Priſoners, to relieve.

Pulpit, making new or repairing the old.

Pulpit-cloth, to provide.

Scholars to maintain at the Univerſities.

School to erect, (*viz.*) of Writing, Reading, Muſick, Mathematicks, but not of Dancing or Fencing.

Schools, free, *viz.* Grammar-Schools.

Schoolmaſter, to maintain.

Seſſions-houſe, to build.

Soldiers, to relieve, (*viz.*) ſick and maimed.

Tradeſmen, young, to ſupport, but not after they have ſerved 5 Years Apprenticeſhip.

Vicaridges, to endow.

And ſuch a charitable Uſe ſhall be good, where the Donor or Teſtator had a Capacity to give or Deviſe, and was entitled to ſuch an Eſtate as he might give, tho' the Conveyance is defective.

(1.) *Either in Reference to the Party, as* by Miſnaming, *or not* Well-naming *him.*

(2.) *In the Execution of the Eſtate, as* where *there is no* Livery *and* Seiſin *to a* Feoffment, *no* Attornment

ment *to a Grant* of a Reverſion, No ſurrender *to the Uſe of the Will where* a Copyhold *is deviſed, no Fine or Recovery, or a defective Recovery by a Tenant in Tail, who deviſed the Eſtate Tail to a charitable* Uſe: Rivett's Caſe, Moor Rep. 890.

(3.) *Where the Will it ſelf is void in Law.*

For in all theſe and the like Caſes, the Statute 43 *Eliz. cap.* 4. ſupplies the Defects; and tho' they cannot be called *legal Gifts*, yet they are good *Limitations and Appointments* of the Charity, which are the very Words of the Statute; this may be ſeen in the Inſtances following.

Firſt, *Where the Deviſe is good, tho' the Deviſee is* miſ-named.

Ff. The Teſtator deviſed a Copyhold in *Barking* to the *Parſon and Church-Wardens* of a Pariſh-Church in *Thames-ſtreet*, *London*, to ſell and employ the Money to a Charity in that Pariſh, adjudged, That tho' the *Parſon* and *Church-Wardens* are not a Corporation to take Lands out of *London*, nor to ſell them for ſuch Uſes, yet the Deviſe is good. Champion *verſus* Smith, Moor Law Cha. Uſes 81.

So a Deviſe to the *poor People* in the Hoſpital of St. *Lawrence* in *Reading*, tho' they could not take by that Name, becauſe they were no Corporation, yet becauſe the *Mayor and Burgeſſes of Reading* were capable to take Lands in Mortmain, and they were Governors of that Hoſpital, it was decreed, That the Lands ſhall be conveyed to them for the Uſe of the Poor there. *Mayor of* Reading *verſus* Lane, Moor Law Cha. Uſes 81.

So a Deviſe to the *Mayor* and *Chamberlain* of *London*, inſtead of the *Mayor*, *Aldermen* and *Commonalty*, which is the Name of Incorporation; yet Law Cha. Uſes 83.

yet 'tis good, becauſe it appears, That the Teſtator intended to give it to the Corporation of *London.*

Platt *verſus* St. John's *College in* Cambridge, Moor Law Cha. Uſes. 77.

(2.) *A Deviſe to a charitable Uſe is good where there is a Defect in the Execution of the Eſtate, as for Inſtance*; a Tenant in Tail of Copyhold-Lands ſuffered a Recovery in the Court of the Mannor to bar the Entail, but no *Judgment* was given againſt the *Vouchee*, and afterwards he deviſed it to St. *John's* College in *Cambridge*; adjudged, That the Recovery was void to bar the Entail, becauſe there was no Judgment againſt the Vouchee to have any Thing in Value, *&c.* but yet the Deviſe is good to the College, as *a Gift or Limitation* of the Lands to a Charity within the Statute, and ſhall not be avoided for Want of a Circumſtance in Law to make it good.

So a *Remainder* without a *particular Eſtate* to ſupport it, is made good by the Statute by a favourable Conſtruction to ſupport a Charity.

Damus's *Caſe.* Moor Rep. 822. Cha. Uſes 72.

(3.) *A Deviſe to a Charity is good, notwithſtanding the Will is void in Law*; as where a Feme Covert was entituled to a Debt as Adminiſtratrix to her former Huſband, and deviſed Part of it in Charity; adjudged, That tho' the Will was void in Law, yet it was a *Declaration* of her Intent within the Statute, ſo that if there was Aſſets of the Inteſtate's Eſtate, or of her own, the Charity ſhall be ſupported.

Bramble *verſus Poor of* Havering, Moor Cha. Uſes 83.

But if a Feme Covert deviſeth a Rent iſſuing out of her own Land to any charitable Uſe, the Statute doth not ſupply that Defect, becauſe the Deviſe was void *ab initio*, for a Feme Covert cannot deviſe any Thing which ſhe hath in her own Right, nor an Infant.

Nathaniel

Nathaniel Mill deviſed 41 *l.* out of the Mannor of *Wolſton* yearly, to be paid to the *Mayor and Three ſenior Aldermen of* Southampton, to put out Apprentices, and for the Relief of aged Perſons, the Money was decreed by Commiſſioners, and that Decree confirmed in *Chancery*, tho' the Mannor was held *in Capite*, and ſo the Will was void as to the third Part. Higgins *and the Poor at* Southampton, DukesCha. Uſes 47.

So in *De Loyd*'s Caſe it was adjudged, That tho' the Deviſe was of Lands held *in Capite*, all ſhall paſs, tho' by the Statute of Wills, one third is to deſcend to the Heir; for tho' it cannot paſs by the Will as a Will, yet 'tis a good *Limitation and Appointment* within the Statute of charitable Uſes. De Loyd's *Caſe*, Hob. 136. Coliſons *Caſe idem* 136.

But if the Teſtator convey two Parts of *Capite* Lands in his Life-time, and Deviſe the remaining third Part to a Charity, this is not avoided by the Statute, becauſe at the Inſtant in which he died, that third Part deſcended to his Heir, and he having diſpoſed of the other two Parts, he is diſabled both by the Common Law and by the Statute of Wills, to deviſe the other third Part, for he is not the lawful Owner of it. *Lord* Montague's *Caſe*, Moor Cha. Uſes 78.

The Teſtator deviſed a Rent out of an Houſe to a Charity, and appointed a Scrivener to put it into Writing and died, then the Scrivener wrote the Will, adjudged, That tho' a Rent cannot be created or granted without a Deed or Will in *Writing*, yet this nuncupative Will was good, not as a Gift by the Deviſe, but as a *Limitation or Appointment* by the Statute to ſupport the Charity. Stoddard's *Caſe*, More Cha. Uſes 81.

So where Sir *Henry Leigh* purchaſed Copyhold Lands in *Woodford* in the Name of his two Sons and their Heirs, and then deviſed to Sir *William Martin* Woodford *Poor verſus* Parkhurſt, MoorCha. Uſes 70.

Martin and his Heirs, a Rent Charge of 40 *l. per Annum* for the Relief of the Poor, *&c. Martin* purchaſed the Land out of which the Rent was iſſuing, and then ſold it to *Parkburſt*, who between the Surrender made to him and his Admittance, had Notice of the Charity; adjudged, That tho' the Eſtate in Law was in the Sons of the Teſtator, and tho' he made no Surrender to the Uſe of his Will, yet by the enjoying the Land in his Life-time, and to the Time of his Death, he ſhall be accompted as the lawful Owner, and his Will, tho' void in Law, ſhall be a good *Limitation* and *Appointment* of the Charity by Vertue of the Statute, and ſo the Arrears were decreed againſt *Parkburſt*, but he may have Contribution by a Bill in Equity againſt thoſe who enjoyed it before him without paying the Charity Money.

Rolt's *Caſe*, Moor Rep. 888. So where the Teſtator before the Statute 32 *H.* 8. of Wills, deviſed his Land to repair Highways, adjudged, That tho' the Land was not deviſeable by Cuſtom, and ſo the Will defective, yet 'tis a good *Limitation and Appointment* within the Statute of Charitable Uſes.

I ſhall now mention ſome other Caſes adjudged upon this Statute.

§§. 1. What hath been done where a Will hath been ſuppreſſed or Money concealed.

2. Where the Deviſee of a Rent Charge purchaſeth the Land, and what ſhall paſs by a Deviſe of the Rents.

3. Some Judgments relating to Executors.

4. What is to be done with the improved Value.

5. Where the Deviſe is to ſell, and doth not ſay by whom.

6. Where the Poor to be relieved are in two Pariſhes.

7. And laſtly, of concurrent Leaſes. *Firſt,*

Firſt, If it can be proved that the Teſtator made a Will, it ſhall be decreed accordingly; as for Inſtance:

James Meek, by Will dated in *November* 1665, gave 100 *l. per Annum* in *Eaſt-Smithfield*, St. *Katherines*, and *Aldgate*, to ten poor Scholars to be choſen out of the Free School at *Worceſter*, and to be educated in *Magdalen-Hall*; and appointed, That if the Rent ſhould encreaſe, then more Scholars ſhould be choſe, and that each ſhould have 10 *l. per Annum*. This Will was ſuppreſſed, and never ſeen after the Death of the Teſtator; but it was proved that he made ſuch a Will, and that a little before his Death he declared that he would not alter it; afterwards a *nuncupative* Will was ſet up by one *Madgwick*, and *pendente lite* between thoſe Wills, Dr. *Hyde*, Principal of the Hall, got Letters of Adminiſtration, then the *nuncupative* Will was ſet aſide, and *John Meek*, the Heir at Law, refuſed to convey the Houſes according to the other Will; but it was decreed, That the Chancellor, Maſters, and Scholars of the Univerſity, and their Succeſſors, ſhould ſtand ſeiſed of the ſaid Houſes, and receive the Rents, and pay the ſame as directed by the Will, which Decree was confirmed in Equity. *Meek verſus Maſter and Scholars of* Magdalen Hall in Oxon. Duke's Cha. Uſes 47.

So where Money was deviſed to a charitable Uſe, and afterwards concealed, the Commiſſioners did decree it with Intereſt for all the Time that it was concealed. *Seymor verſus Poor of* Thetford, Moor Ch. Uſe 79.

(2.) * *Where the Deviſee of a Rent-Charge to a charitable Uſe, purchaſeth Part or all the Lands out of which the Rent is iſſuing*, tho' in Point of Law the Rent is extinguiſhed, yet the Commiſſioners may decree the Rent to be revived, and ſettle it upon Truſtees to ſupport the Charity for which it was intended * *Lord* Dorſett *and* Eaſtgrinſted. Moor Cha. Uſes 64.

intended by the Teſtator; and ſo it was adjudged in *Eaſtgrinſted*'s Caſe, 9 *Car.* * adjudged, That a Deviſe of a Rent to a charitable Uſe, is the Deviſe of the Land itſelf, according to † *Kerry* and *Dethick*'s Caſe; and that by ſuch a Deviſe, not only the Rent then reſerved, but the Rent afterwards upon any improved Value ſhall paſs.

* Kennington Haſtings *in* Com. Warr. Moor Cha. Uſes 71.

† Moor Rep. 640. *Poor of* Walthamſtoe, 4 Car. Moor Law Cha. Uſes 63.

(3.) *Now as to Executors, altho' two or more may have a joint and equal Power over the Charity, yet one alone may be chargeable,* as if they all prove the Will, and they permit one to receive the Money given to the Charity, who afterwards dies inſolvent, the Survivors ſhall be charged with the whole, if the Teſtator left ſufficient Aſſets, becauſe they jointly medled with the Execution of the Will, which if they had not done, but had left it wholly to the other, then they could not be charged.

So if *Executors* detain the Money, and will not apply it to the Charity for which it is given, the Commiſſioners may decree the Money and Intereſt.

Penſtred *verſus* Payer, Moor Cha. Uſes 82.

The Caſe is the ſame where a particular Sum of Money is deviſed to a Charity, as if 20*l.* is given to maintain a preaching Miniſter, not appointed out of what it ſhall iſſue, and the Teſtator left Lands, and likewiſe perſonal Aſſets, and made his Wife Executrix, and died, ſhe refuſed to buy Lands or Rents of that Value; but the Court of *Chancery* decreed her to buy it, and ſettle it upon the Charity.

(4.) *Where the Teſtator doth not direct what ſhall be done with the improved Value,* (as he did in *Meek*'s Caſe before mentioned) it ſhall go to encreaſe the Charity; and ſo it was adjudged in the Caſe of *Thetford School,* (*viz.*) Lands of the yearly Value

Thetford School, 8 Rep. 130. Moor Cha. Uſes 71.

of

of 35 *l. per Annum*, were deviſed by Sir *Thomas Fulmerſtone*, to maintain a Preacher, Schoolmaſter, and poor People in *Thetford*, and by the Will a Diſtribution was made of a certain Portion to each; afterwards theſe Lands were improved to the yearly Value of 100 *l.* adjudged, That the Surplus ſhall be applied to encreaſe the ſeveral Stipends in Proportion, and it ſhall not go to the Heir, becauſe it appeared that the Teſtator intended all the ſaid Lands for the Charity.

(5.) *Where the Teſtator deviſed that his Land ſhould be ſold*, and the Money applied to a Charity, and doth not direct *by whom* it ſhall be ſold, the Commiſſioners may appoint any Perſon to ſell, and decree the Sale to be good. Steward *verſus* Germin, Moor Cha. Uſes 79.

(6.) *Where a Deviſe is to the Churchwardens and Overſeers of the Poor of a particular Pariſh*, for the Relief of the Poor of *that Pariſh*, and it happens to lie in *two Counties*, it may be applied to the Relief of thoſe Poor which live in one Part of the Pariſh, and nothing to the Poor of the other Part, *(viz.) Mary Chambers*, by Will dated 7 *June* 1654, deviſed 100 *l.* to the Churchwardens and Overſeers of the Poor of St. *Giles's Cripplegate*, *London*, to be paid to them for the Encreaſe of the Pariſh Stock; they received it, and put it out to Intereſt, and received the Profits, and paid it to the Poor of that Part of the Pariſh which lies in *London*, and that Part of the Pariſh which lies in *Middleſex* had none; adjudged, That it was well paid. Rooks *and others, and* Dorrington, 19 Car. 2. Duke's Cha. Uſes 52.

(7.) Having already mentioned what ſhall be done with the *improved Value* of Lands given to a Charity, I ſhall conclude this Title with a Caſe wherein the *true Value* was conſidered, *(viz.) Joyce Franklands* by Will dated 20 *Feb.* 1586, deviſed a Portion of Tythes in *Banſted* to five Perſons and their Heirs, to the Intent they ſhould em- Wright *and the School of* Newport, 16 Car. 2. Duke's Cha. Uſes 46.

ploy the yearly Profits to erect a Grammar School in *Newport* in *Eſſex*, for a competent Number of Children of the Inhabitants of that Place, *&c.* and if there was but one Maſter, then he to have 20*l. per Annum*, and if a Maſter and Uſher, then each to have 20 Nobles, and appointed the Maſter of *Gonvile* and *Caius* College Governor.

Theſe Tythes were in Leaſe at the Time of the Deviſe for ſeveral Years, at the yearly Rent of 7*l.* the Deviſees received the Rent, and built a School, and demiſed the Tythes to *Richard Wright* for 36 Years, at 7*l. per Annum.*

Anno 1610, in Conſideration of a Surrender of that Leaſe, they let the ſaid Tythes to him for 50 Years at the ſame Rent; the Leſſee died *Anno* 1634, and the Tythes from his Death to the Year 1650, were worth 43*l. per Annum* more than the Rent reſerved, and as ſuch they were held and enjoyed by *Robert* the Executor of *Richard Wright* during all that Time.

Anno 1646, the ſurviving Truſtees leaſed the Tythes to one *Nightingale* for 21 Years, at 10*l. per Annum*, which Leaſe was to commence after the Determination of the Leaſe for 50 Years; *Nightingale* ſold the ſaid Term of 21 Years for a valuable Conſideration, and from *Michaelmas*, *Anno* 1650, to *Michaelmas* 1660, (at which Time the Leaſe for 50 Years expired) the Tythes were worth 60*l. per Annum* more than the reſerved Rent; adjudged, That the concurrent Leaſe for 21 Years was to defraud the charitable Uſe, and that the ſame was void, and that the Truſtees ought to let it at the true Value, and for a Term not exceeding 21 Years.

Hob. 136. In Dr. *Flood*'s Caſe before mention'd, the Deviſe was to the principal Fellows and Scholars of *Jeſus* College in *Oxon*, and their Succeſſors, to find a Scholar of his Blood, it was agreed, That this Deviſe

Deviſe was void in Law, becauſe the Statute 34 *H.* 8. of Wills did not allow deviſes to *Corporations in Mortmain*; but yet it was held good by the Statute 43 *Eliz.* as a *Limitation* and an *Appointment* of Lands to a Charity.

So where a Deviſe was of Lands to *Trinity* College in *Cambridge* for the Maintenance of a Fellow there, and *if any Cavil ſhall binder this Deviſe, or that the ſame cannot go to the College by Reaſon of the Statute of Mortmain*, then he deviſed the ſame to *Robert Newman* and his Heirs, and upon an Information exhibited by the Attorney General to have this Land eſtabliſhed to the College, it was decreed accordingly by Virtue of the Statute 43 *Eliz. &c.* Rex *verſus* Newman, 1 Lev. 284.

More relating to this Statute may be ſeen in *Adams* and *Lambert*'s Caſe, 4 *Rep.* fo. 96.

Chattels.

BY this Word, all Goods moveable and immoveable are comprehended, excepting only ſuch which are in Nature of a Freehold or Parcel of it.

And theſe are either *Perſonal*, (*viz.*) ſuch as belong immediately to the Perſon of the Man, or *Real*, (*viz.*) ſuch which iſſue out of ſome immoveable Thing, as a Leaſe or Rent iſſuing out of Lands.

Chattels perſonal are,
- *Apprentices,*
- *Bills,*
- *Bonds,*
- *Books,*
- *Boxes,*
- *Bedding,*
- *Cabinets,*
- *Carts,*
- *Cattle,*

Chattels personal are,
- *Cheſts*,
- *Coaches*,
- *Corn*, growing, or cut,
- *Deſks*,
- *Ferrets*,
- *Greyhounds*,
- *Hemp*,
- *Hay*,
- *Hops*,
- *Houſhold ſtuff*,
- *Hounds*,
- *Jewels*,
- *Iron*,
- *Linnen*,
- *Maſtiffs*,
- *Money*,
- *Mortgages*,
- *Muſical Inſtruments*,
- *Pewter*,
- *Plate*, will not paſs by the Name of Jewels or Utenſils.
- *Plows*,
- *Saffron*,
- *Ships*,
- *Trees felled*,
- *Trunks*,
- *Waggons*,

- *Apparel*,
- *Books*,
- *Carts*,
- *Coaches*,
- *Cattle*,
- *Corn*,
- *Plate for Ornament*,
- *Plow Gear*, &c.

} will not paſs by the Word Utenſils.

Yet all theſe, and many more of the like Nature, will paſs under the Name of Moveables, and are accounted

accounted in the actual Poſſeſſion of the Executor, immediately upon the Death of the Teſtator, tho' they are many Miles diſtant from him.

Chattels Real. { *Advowſons*, *Commons*, *Fairs*, *Houſes*, *Lands*, *Markets*. } { Leaſes for Years of theſe and the like.

All thoſe and more of that Nature paſs by the Name of Immoveables, and are not in the Poſſeſſion of the Executor till an Entry made, or until recovered, except Leaſes for Years of *Tythes*, becauſe in ſuch Caſe there can be no Entry made; neither are Debts owing to the Teſtator, or Arrears of Rent due to him, in the actual Poſſeſſion of the Executor till recovered.

I ſhall here mention ſome Caſes which concern,

(1.) *A Deviſe of a Perſonal Eſtate in* general.
(2.) *A Deviſe of a Perſonal Thing with* Remainder over, *and a Deviſe of the Uſe thereof.*
(3.) *A Deviſe of particular Things, as* Corn, Jewels, Utenſils, *&c.*
(4.) *A Deviſe of Goods to a* particular Purpoſe.
(5.) *A Deviſe of* Money.
(6.) *A Deviſe that his* Debts *ſhall be paid out of his* Land *or* Chattels.
(7.) *A Deviſe for Term of Years.*

Firſt, *As to a Deviſe of the Perſonal Eſtate in general*, the Teſtator deviſed a *Moiety* thereof to his Wife; then he gave ſeveral Legacies to particular Perſons, and afterwards he deviſed the *Reſidue* to another; adjudged, that if there is enough to pay the *Debts*, the Wife ſhall have a *full Moiety of* Lee *verſus* Hale, 1 Ch. Rep. 16.

the Whole, and that the *Debts* ſhall be paid out of the *Reſidue*; and if he had Money, Bond, and a Leaſe for Years, a *Moiety* of all ſhall paſs.

(2.) *As to a Deviſe of a Perſonal Thing with Remainder over*, it cannot be by the Rules of Law, but the *Uſe* may be deviſed to *one*, and the *Remainder* to another, in which Caſe the Property is veſted in the laſt Deviſee, concerning which there have been ſeveral Judgments and Reſolutions in the Books.

2 And. 185 * *Quere of thoſe Words.*

If. Leſſee for Years deviſed to his Son *John* the *whole Years* he had in the Farm, and * if he died, then he gave it to his Daughters, and made his Son Executor, and died. *John* the Son proved the Will, and died Inteſtate, his Adminiſtrator ſold the Term; and adjudged good, becauſe a Deviſe of a Chattel with *Remainder over* is void.

But ſince, in a Court of Equity, a Deviſe of a Chattel real with *Remainder over*, has been held good.

Leech *verſus* Leech, 1 Ch. Rep. 249.

As where the Teſtator made a Leaſe in Truſt, referring to his Will, and then deviſed Portions to his Daughters, to be paid at their Marriage or Age of 21 Years, and if they die before, *then to other Perſons.* The Daughters had no other Maintenance, and none could be decreed, becauſe of the Deviſe over, which was held to be good.

And ſo it was held in the Caſe of *Whitmore* and *Craven*, *viz.* That a Deviſe of *Chattel Real Remainder over* was good, but it was never allowed of a *Perſonal Chattel.*

Whitmore *verſus* Craven, 2 Ch. Rep. 167.

The Caſe was, *viz. Whitmore* deviſed the Reſidue of his perſonal Eſtate conſiſting in Chattel, Houſhold Goods, Plate, Jewels, Arrears of Rent, and Debts on Bond, *&c.* to the Earl of *Craven*, for the *Uſe* of *William Whitmore* his only Son, and the *Heirs of his Body*; and *if he died without Iſſue*, and in his *Minority*, then *to the Iſſue of the Siſters of*

of the Teſtator. He made his Son Executor, and the Lord *Craven* Executor *durante minore ætate*, the Son died upwards of 17, and under 21, and without Iſſue, having firſt deviſed all his Perſonal Eſtate to his Wife. And it was decreed for her, becauſe the Limitation of *Money* and Perſonal Chattels *to the Siſters Children* was void in Law; 'tis true, it hath been allowed in *Chattels Real*, but never in Money or Chattels Perſonal, for the *Uſe* of Money is Money itſelf, the Property whereof in this Caſe was veſted in the Son *at ſeventeen Years* of Age, for then he was out of his Minority as to his being an Executor, and the Property was in him, which being once veſted, ſhall never be diveſted.

But as to the Uſe of a perſonal Thing Remainder over, that may be well deviſed, and ſo is the Year-Book; but a perſonal Thing itſelf cannot be ſo deviſed, becauſe a Deviſe of ſuch Thing for an Hour, is a Deviſe for ever. Pas. 2 Ed. 6.

The Law being thus, it ſeemed a very odd Deviſe of *Fitz James*, who was Chief Juſtice of *England*, *Anno* 22 *H.* 8. *viz.* he deviſed the *Uſe* of his Plate and Jewels to his Son, and the *Heirs Males of his Body*; but the Judges held, That the Son had no Property in them, but only the *Uſe*. Owen 33.

The Lord *Audley*'s Widow uſually wore a Chain of Diamonds and Pearls; ſhe married Serjeant *Davis*, and he deviſed the *Uſe* thereof to her during her Widowhood, ſhe giving Security to leave them to his Daughter. The Court was divided, whether, notwithſtanding this Deviſe, ſhe ſhould retain them as *Peripharnalia*; two Judges held ſhe might, becauſe they are convenient for a Woman of her Quality, but two were of another Opinion, becauſe what may be convenient may not be neceſſary; but *Jones*, who reports this Caſe, tells us, That by the Opinion *Lord Haſtings verſus* Duglas, Cro. Car. 343.

of three Judges, the Wife ſhall retain theſe Jewels againſt the Will as her neceſſary Apparel and Ornaments, and that the Huſband cannot diſpoſe of them by Will, though he might have ſold them in his Life-time, which not having done, the Property is veſted in the Widow immediately upon his Death.

March Rep. 106. Deviſe of his *Goods* to his Wife for Life, and after her Deceaſe to *W. N* who commenced a Suit in Equity in the *Marches of Wales*, to ſecure his Intereſt in Remainder: But a Prohibition was granted, becauſe a Deviſe of the Goods themſelves with a Remainder over is void, but not if the *Uſe and Occupation* of them is firſt deviſed.

Vachell *verſus* Lemon, 1 Ch. Rep. 129. So a Deviſe of the *Uſe* of ſeveral Paintings, Books, and Medals to his *Wife for Life*, and after her Deceaſe, that the ſame ſhould *remain to his Son*, if ſhe be with Child with a Son, if not, or if the Son ſhould die without Iſſue Male of his Body, that then the ſame ſhould *remain to the Uſe of Thomas Vachell*, decreed, that this Limitation was void.

Pate *verſus* Hatton, 1 Ch. Rep. 199. A Citizen of *London* deviſed a Sum of *Money* to his Son, (which was more than his *Cuſtomary Part*) and if he died before 21, then he deviſed it over to another; decreed, That this Deviſe over for ſo much as was the Cuſtomary Part, was void: For if the Son die before 21, his Adminiſtrator ſhall have the Cuſtomary Part, and the Surplus ſhall go to whom it was deviſed.

(3.) *As to Deviſes of particular Things, as Corn, Jewels, Utenſils, &c.* Some Diſtinctions have been made in Deviſes of that Nature, as where the Teſtator deviſed the Corn which ſhall *grow on Black Acre* in the Year next after his Death, and there was no Corn growing on that Acre in that Year, the Legacy is void; but if he had deviſed a certain Quantity of Corn, and appointed it *to be*

be paid out of his Corn, which ſhall be growing in that Year, in ſuch Caſe the Deviſe is good, becauſe 'tis a Deviſe of an abſolute Legacy, appointing how it ſhall be paid, which though it cannot be done in that Manner, yet that doth not Effect the Legacy it ſelf. But 'tis void in the other Caſe, becauſe the Legacy was reſtrained and limitted to Corn, which ſhould grow on a particular Parcel of Land, and none did grow there.

But as to Corn in general, a * Leſſee for Years or Tenant in Dower, may deviſe all ſuch which is † growing at the Time of their Deaths, and ſuch Deviſe is good.

* 8 H. 3. Fitz, Deviſe 25.
† 4 H. 3. Fitz, Deviſe 26.

It hath been a Queſtion, what paſſes by the Word *Jewels*, *viz.* the ‖ Earl of *Northumberland* deviſed his Jewels to his Wife; adjudged, That neither a Collar of *SS*'s, or a Garter of Gold did paſs, becauſe thoſe were not properly Jewels, but Enſigns of Honour; and that the Gold Buckle in his Bonnet, and the Gold Buttons on his Cloaths, did not paſs, becauſe they were annexed to his Robes; but Chains of Gold, Bracelets, and Gold Rings, did paſs by that Word.

‖ *Earl of* Northumberland's *Caſe*, Owen 124.

But *Plate* and *Jewels* will not paſs by a Deviſe of *Utenſils*.

Latimer's *Caſe*, Dyer 59 *b*.

(4.) *Where Goods are deviſed to a particular Purpoſe, there no Intereſt is veſted in the Deviſee*; as for Inſtance, the Teſtator deviſed ſeveral Legacies, and the Reſidue (after Legacies paid) to his Wife, *to diſpoſe for the good of his Soul, and for Payment of his Debts*, and made her ſole Executrix, and died; ſhe married again, and her Huſband made an Executor, and died; adjudged, That the Widow, and not the Executor of her ſecond Huſband, ſhall have the Reſidue of the Goods, becauſe ſhe had no *Intereſt* in them by the firſt Will as to herſelf, but for Payment of his Debts.

Dyer 331. *See* Authority.

(5.) *Money*

Broadhurſt *verſus* Richardſon, 2 Vent. 349.

(5.) *Money cannot be deviſed from one to another,* either by general Words as in the Caſes before mentioned, or by deviſing the Money it ſelf, as where the Teſtator had Iſſue three Daughters, and deviſed to them 540*l.* equally to be divided, *and if any of them died without Iſſue, her Part to go to the Survivor.* One of them married the Plaintiff, and died without Iſſue; and upon a Bill exhibited againſt the Executor and the ſurviving Siſters, the Huſband had a Decree for 180*l* being the third Part, becauſe a Sum of Money cannot be thus entailed.

Martin *verſus* Dowell, 2 Ch. Rep. 198.

Deviſe of a Sum of Money to *R. B. to be diſpoſed by him for certain Purpoſes which he ſhould in a private Note acquaint him withal*; he died without making any Appointment; it was decreed for *R. B.* becauſe 'tis a Bequeſt to him, and not to the Executors, for it doth not appear that they were to have any Share.

Deviſe of 140*l.* to the Daughters of *B.* who had five then living, and before the Teſtator died he had two more; adjudged, that they ſhould have no Share of this Money, becauſe there being five Daughters living at the Time of making the Will, it ſhall not be intended that the Teſtator deſigned it for any more.

Pitt *verſus* Pigeon, 1 Ch. Rep. 301.

Deviſe of 300*l.* to be paid to his Child which he ſhall have at his Death, and if none, then to his Siſter. Afterwards he had three Children born and living, and then by a Codicil he deviſed 200*l.* apiece to his Children, but did not ſay *for their Portions*, nor any Thing to avoid or affirm the Will; decreed, That the three Children ſhall have an equal Share of the 300*l.* and ſhall each of them have 200*l.* by Way of Accumulation.

Cloberries *Caſe*, 2 Vent. 342. 2 Ch. Rep. 155.

The Caſes following are where Money was deviſed upon a Contingency, viz. the Teſtator deviſed *Money* to a Woman *at* her Age of 21, or Marriage, *to be paid*

paid to her with Intereſt, and ſhe died before 21, and unmarried; adjudged, that the Money ſhall go to her Executor; but if it had been at the Age of 21, or Marriage, without ſaying *when to be paid*, and ſhe had died before, 'tis a lapſed Legacy; ſo 'tis if the Deviſe had been of a Sum of Money, *when* ſhe comes of Age or be married, and ſhe die before.

(6.) *Concerning Deviſes of Lands for Payment of Debts, the Reader may obſerve the Caſes following:*

If. The Teſtator deviſed his Lands to his Executors for the *Payment of his Debts*, and until they ſhould be paid, Remainder over; adjudged, that the Executors had no Eſtate for *Life*, but only a *Chattel Intereſt* determinable upon the Payment of the Debts. *Cordel's Caſe*, 8 Rep. 96. a. Cro. Eliz. 315.

My Lord *Coke* cites this Judgment in *Matthew Manning*'s Caſe, and tells us, he was of Council with the Executors, and that if it had been conſtrued to be an Eſtate for their Lives, then it would have determined upon their Deaths, which might happen before the Debts were paid; and by Conſequence they might never be paid, becauſe in ſuch Caſe the Eſtate would not go to their Executors; but if it was a Chattel Intereſt, then it would be Aſſets, and remain to their Executors, and the Debts would be all paid, which was the Intention of the Teſtator; but he agreed, if ſuch Eſtate had been by Grant, or by any Conveyance at Common Law, it had been for *Life*. 8 Rep. 96.

If the Teſtator deviſes his Land *for Payment of his Debts*, and makes an Executor, and dies, leaving Aſſets, no Part of the perſonal Eſtate ſhall be applied to pay his Debts, becauſe he made a Proviſion for it out of his Lands, which ſhews he intended his perſonal Eſtate for his Executor; but if a Man by any other Conveyance diſpoſeth Lands *Feltham verſus Harleſton*, 1 Lev. 203.

Lands *for Payment of his Debts*, and then dies *Inteſtate*, leaving perſonal Aſſets, that ſhall be charged in the Hands of an Adminiſtrator for the Payment thereof; and this for the Benefit of the Heir, becauſe it doth not appear that he intended any Thing for his Adminiſtrator.

(7.) *As to Deviſes for Term of Years, it being a Chattel, I ſhall only mention a few Caſes of that Nature in this Place, referring the reſt to its proper Title.*

In *Chancery* the Caſe was, The Father had Iſſue one Son and two Daughters, and being poſſeſſed of a *Leaſe for Years*, he deviſed it to his Son, and if he died, then to his Daughters, and if they die, then to his Wife, and made his Son ſole Executor, and died; the Son entered, and died Inteſtate, and his Widow took out Adminiſtration, and ſold the Term for a valuable Conſideration; it was decreed that her Sale was good.

Handle *verſus* Brown, Moor 748.

ſſ. Leſſee for Years deviſed, That his Wife ſhould have the Lands *for ſo many Years as ſhe ſhould live, and after her Deceaſe the Reſidue to his Son, and his Aſſigns*, and he made his Wife Executrix, and died; ſhe proved the Will, and entered and agreed to the Legacy, and then the Son died, ſhe afterwards ſold the Term, and died; adjudged, That the *Adminiſtrator of the Son* ſhall have the Reſidue of the Term, and not the Purchaſer; becauſe the whole Intereſt thereof was not abſolutely given to the Wife, but only conditionally, *viz. for ſo many Years as ſhe ſhould live*; that is, That ſhe ſhould have the Eſtate ſo long; ſo that when ſhe dies her Intereſt is determined, therefore the Deviſe to the Son ſhall be expounded to precede the Deviſe to the Wife, that both may ſtand, for there is no expreſs Deviſe to her *for Life*; if it had been ſo, then ſhe would be entitled to the *whole Term*, becauſe an Eſtate for *Life* being

Welcden *verſus* Elkinton, Plow. Com. 517.

being a Freehold, is more valuable in Judgment of Law than an Eſtate for Years; but ſhe having no expreſs Eſtate for Life deviſed; the Words, *viz. after her Deceaſe* the Reſidue to her Son, do not give her an Eſtate for Life by *Implication*.

And as a Term for Years will paſs by a *Deviſe of all his Goods*, ſo if the Legatee ſues to have the Term, he muſt make the Executor a Party, or his Bill will be diſmiſſed. Portman *verſus* Willis, Moor 352. Moor *verſus* Blagrave, 1 Ch. Rep. 277. *See Deviſe of Goods.*

The Wife being with Child, her Huſband deviſed all his perſonal Eſtate to be laid out in Lands, and if ſhe had a Son, to be ſettled on him, and if ſhe had a Daughter, then ſhe to have 3000*l. paid at the Day of her Marriage*, and that her Mother ſhould have 80*l. per Annum*, Part of the Intereſt of the ſaid 3000*l* for the Education of ſuch Daughter. The Teſtator died, and afterwards the Wife was delivered of a Daughter. The Queſtion was, Whether ſhe ſhould have the remaining Intereſt of the 3000*l*. which was not diſpoſed by the Will, or whether it ſhould go to the Executor of the Huſband? It was inſiſted for him, That the Father intended no more than 3000*l*. for his Daughter, and that by appointing 80*l*. yearly out of the Intereſt for her Education, he had excluded her from the reſt; but it was decreed, That where a Sum of Money is given to be paid at a particular Time to a Child, ſuch Child ſhall have the whole Intereſt of it to that Time, rather than any Part of it ſhall go to the Executor; that this is very clear, where no Maintenance is provided for the Child till that Time; and even in this Caſe, where a Maintenance was appointed, the Court decreed, That the Executor ſhould accompt to the Daughter for the Intereſt. 2 Vent. 346

Upon the Pleadings in Equity the Caſe was, Sir *William Blois* had Iſſue a Son and *two Daughters* by

by the firſt Venter, and *a Daughter* by the ſecond Venter named *Jane*; and upon his ſaid ſecond Marriage, he ſettled Lands in Jointure to his Wife for Life, and after her Deceaſe, in Caſe he had but one Daughter, and no more, then to raiſe 3000 *l.* for ſuch Daughter, to be paid at her Day of Marriage, ſo as ſhe married after ſixteen; afterwards *he deviſed the Reverſion of thoſe Lands* to other Perſons, and directed, that after his Son ſhall raiſe 9000 *l.* for his three Daughters, then he to have the Lands. The Queſtion was, that ſince *Jane* had 3000 *l.* by the Settlement, and there being 9000 *l.* appointed for the three Daughters by the Will, Whether ſhe ſhould take a double Portion, one by the Settlement, and another by the Will? And the Lord Keeper *Finch* decreed, the Will was only an accumulative Security for the 3000 *l.* given by the Settlement, and that upon Payment of 9000 *l.* the Plaintiff ſhould have the Lands.

Blois verſus Blois 2Vent. 347

Decreed, that where Lands are deviſed for Payment of Debts and Legacies, and the Reſidue of any perſonal Eſtate is given to an Executor after Debts and Legacies paid, in ſuch Caſe the perſonal Eſtate ſhall, in the firſt Place, be applied to the Payment of the Debts and Legacies as far as it will go, and that the Lands ſhall not be charged any farther than to make up what the perſonal Eſtate falls ſhort.

2Vent. 349

The Father deviſed 250 *l.* to his Son, and made his Wife Executrix, and died; the Widow married again, and then the Son exhibited a Bill in Equity againſt the Huſband and Wife, to have this Money-Legacy of 250 *l.* The Defendants in their Anſwer pray an Allowance *for the Maintenance and Education of the Son*; but the Court would not allow that the Sum ſhould be diminiſhed, becauſe by the Law the Mother ought to maintain

maintain her Child, but a Sum of Money for binding him Apprentice, and paid by the Mother, ſhall be allowed to her in Diſcount. 2 Vent. 353

The Father having three Daughters, *Mary* who was unmarried, and *Martha* and *Elizabeth* both married, deviſed 400 *l.* to *Martha*, her Huſband giving Bond to his Executors, upon Payment thereof, to purchaſe Lands of that Value, and ſettle it on her, and the Heirs of her Body; and deviſed the Reſidue of his perſonal Eſtate to purchaſe Lands of the like Value, to be ſettled on the Heirs of the reſpective Bodies of his ſaid three Daughters, or otherwiſe, *Mary* the unmarried Daughter, and the *two Huſbands of his married Daughters, ſhall give Bond for ſo much Money as they ſhall reſpectively receive of the reſiduary Part of his Eſtate, to be divided into three Parts*, and to ſettle the ſame upon the Child or Children of their Wifes, *&c.* Afterwards *Martha* died within ſix Months after her Father, leaving Iſſue one Daughter, who died within four Months after her Mother. Then the Father of the Child, and *Huſband of* Martha, *took out Adminiſtration both to his Wife and Daughter*, and exhibited his Bill in Equity, *to have the* 400 l. *and likewiſe a third Part of the Reſidue of the perſonal Eſtate of the Teſtator*, which amounted to 700 *l.* The Chancellor *Finch* decreed the Payment of the 400 *l.* *with Intereſt* from the Time of the exhibiting the Bill; but as to the 700 *l.* it was diſmiſſed, becauſe the Right to it was not veſted in the Child, *till the Executors had made an Election, either to purchaſe Lands and ſettle them as directed by the Will, or to pay the Money to the Daughters and their Huſbands*, that they might purchaſe Lands, and ſettle them to the ſame Uſe; and if nothing veſted in the Child till ſuch Election made, then, by Conſequence, nothing could veſt in the Father as Adminiſtrator to ſuch Child;

by the firſt Venter, and *a Daughter* by the ſecond Venter named *Jane*; and upon his ſaid ſecond Marriage, he ſettled Lands in Jointure to his Wife for Life, and after her Deceaſe, in Caſe he had but one Daughter, and no more, then to raiſe 3000 *l.* for ſuch Daughter, to be paid at her Day of Marriage, ſo as ſhe married after ſixteen; afterwards *he deviſed the Reverſion of thoſe Lands* to other Perſons, and directed, that after his Son ſhall raiſe 9000 *l.* for his three Daughters, then he to have the Lands. The Queſtion was, that ſince *Jane* had 3000 *l.* by the Settlement, and there being 9000 *l.* appointed for the three Daughters by the Will, Whether ſhe ſhould take a double Portion, one by the Settlement, and another by the Will? And the Lord Keeper *Finch* decreed, the Will was only an accumulative Security for the 3000 *l.* given by the Settlement, and that upon Payment of 9000 *l.* the Plaintiff ſhould have the Lands.

Blois verſus Blois 2 Vent. 347

Decreed, that where Lands are deviſed for Payment of Debts and Legacies, and the Reſidue of any perſonal Eſtate is given to an Executor after Debts and Legacies paid, in ſuch Caſe the perſonal Eſtate ſhall, in the firſt Place, be applied to the Payment of the Debts and Legacies as far as it will go, and that the Lands ſhall not be charged any farther than to make up what the perſonal Eſtate falls ſhort.

2 Vent. 349

The Father deviſed 250 *l.* to his Son, and made his Wife Executrix, and died; the Widow married again, and then the Son exhibited a Bill in Equity againſt the Huſband and Wife, to have this Money-Legacy of 250 *l.* The Defendants in their Anſwer pray an Allowance *for the Maintenance and Education of the Son*; but the Court would not allow that the Sum ſhould be diminiſhed, becauſe by the Law the Mother ought to maintain

maintain her Child, but a Sum of Money for binding him Apprentice, and paid by the Mother, ſhall be allowed to her in Diſcount. 2 Vent. 353

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Child; tho' it was inſiſted for him, that he might have given his Bond for the third Part of the Reſiduum as directed by the Will, and ſo to ſecure it for the Child, which is very true; but yet in ſuch Caſe it would not have come to him as Adminiſtrator, becauſe it ought to be laid out in Lands, and ſettled as the Will directs.

Collett *verſus* Collett, 2 Vent. 356

Choſe in Action.

THIS is a Thing incorporeal, and only a Right which a Man hath to a Debt or Duty; as to a Debt on a Bond, Damages on a Covenant, *&c.* and becauſe it hath no real Exiſtence, it can never be ſaid to be in the Poſſeſſion of the Party, till actually recovered by a Suit or otherwiſe, and therefore 'tis not deviſeable till in his Poſſeſſion.

Pheſant *verſus* Pheſant, 2 Vent. 340

And as to this there is a remarkable Caſe, *ſſ.* An Orphan, whoſe Portion was in the Court of Orphans, married, and her Huſband deviſed the Money to her, provided ſhe did not claim Dower, and dies before ſhe came to the Age of 21 Years. It was inſiſted in the Court of *Chancery*, That this Money was deviſeable as a Chattel-Perſonal actually veſted in the Huſband by the Inter-marriage, and that the Court of Orphans had only *Cuſtodiam*, with which the Chamberlain of *London* was entruſted, and that his Poſſeſſion ſhall be taken to be the Poſſeſſion of the Huſband; for 'tis not *Debitum* to the Chamberlain, and to be reduced into Property by an Action brought againſt him, but 'tis only *Depoſitum*.

But it was adjudged, That ſince by the Cuſtom the Money is to be recovered, when the Orphan comes of full Age, or is married, 'tis a Choſe in Action, and Debt lies for it; 'tis true, 'tis uſual for the common Serjeant to treat upon the Marriage,

Marriage, and to take Security for the Orphan, but 'tis ſtill a Choſe in Action, and not therefore to be deviſed.

Codicil.

THIS is a Schedule in Writing annexed to a Will, either adding or explaining, altering or revoking it in whole or in Part. The Original whereof was meerly Occaſional, for there were ſo many Solemnities required to a Will by the Civil Law, that many Times Men had not Opportunity to perfect their Wills, and therefore this Method was introduced to fulfil the Intention of the Teſtator.

It differs from a Will, becauſe it may be made without appointing an Executor, which is eſſential to a Will where the Perſonal Eſtate is deviſed.

It differs from it likewiſe in other Reſpects, *viz.* there can be but one Will, but a Man may have many Codicils, and the laſt doth not revoke the former, or make them void, if 'tis not directly contrary; and if there are two Codicils, and it doth not appear which was firſt made, and the ſame Thing is deviſed to two Perſons, 'tis not a void Legacy by the Civil Law; for it ought to be divided between both.

Co-Executors.

See *Pleas by Executors.* See *Bonis Propriis.*

JOINT Executors repreſent the Perſon of the Teſtator, and therefore are eſteemed by the Law but as a ſingle Perſon; for Acts done by one of them which relate either to the Delivery, Gift, Sale, Payment, Poſſeſſion, or Releaſe of any of the Teſtator's Goods, are accounted the *See Term for Years,*

Acts of all of them, notwithſtanding they have a joint and entire Authority over the whole.

And becauſe they are but as one ſingle Perſon in Law, therefore one cannot ſue the other for any Thing relating to the Teſtator's Will, or to that Power or Intereſt which he hath as Co-Executor, except where one is made *reſiduary Legatee*, as well as Executor; for in ſuch Caſe, that Executor may maintain an Action of Treſpaſs againſt his Companion, for taking or detaining the Remainder of the Goods from him.

Poſtea 169.

The ſeveral Caſes which relate to Co-Executors, may be thus divided:

ſſ. (1.) *How they muſt join in an Action, being Plaintiffs.*
(2.) *How they muſt be joined, being Defendants.*
(3.) *Of Summons and Severance.*
(4.) *Where the Act of one ſhall be good alone.*
(5.) *Where not.*
(6.) *Where the Death of one ſhall abate the Action.*
(7.) *The Power of one who proveth the Will, and of the other who refuſeth.*

Firſt, Becauſe they all repreſent but one Perſon, (*viz.*) the Teſtator, therefore they muſt join in any Suits brought to recover his Eſtate, ſo is the Year-Book, 9 *H.* 5. 6. (*viz.*) they muſt all be named, as well thoſe who * proved the Will, as thoſe who refuſed; but if they are Defendants, in ſuch Caſe thoſe only are to be named who proved the Will.

Fitz. Abr. Ex. 48.
* 9 H. 6. 6. S. P.

But 'tis no good Plea for an Executor Defendant to ſay, That there is another Executor not named, and yet living, without ſetting forth that he adminiſtred; but where an Executor is Plaintiff, 'tis a good Plea, without alledging that the Executor adminiſtred; for if one of them doth

doth adminiſter, the Action muſt be brought in the Name of all; but where they are Defendants, the Action may be brought in the Name of him who adminiſters: And the Reaſon why it muſt be brought in the Names of all, is, becauſe on producing the Will, it will appear that they are all Executors; and therefore, if the Defendant ſhould plead that there is another Executor not named, and the Plaintiff ſhould reply that ſuch Executor was diſcharged of the Adminiſtration, or that he never adminiſtred as Executor, yet that will not be ſufficient, becauſe he may adminiſter when he will. *

† One Executor had the Poſſeſſion of the Teſtator's Goods which were taken from him; yet both muſt join in the Action of Treſpaſs, becauſe the Poſſeſſion of one is the Poſſeſſion of both, ‖ and therefore if one ſhould bring the Action, and the other ſhould releaſe it, ſuch Releaſe would be good.

‡ Two are made Executors, Proviſo, that one ſhall not adminiſter, yet the Action may be brought in the Name of both.

** The Mother and her Son, *an Infant*, were made Executors, and Adminiſtration was granted to her during the Minority of her Son; ſhe married again, and then her Huſband and ſhe joined in Action of Debt as Executrix; but becauſe the Infant was not named, it was held wrong in a Plea in Abatement, and upon a Demurrer to that Plea; but if it had been ſet forth ſpecially in the Declaration that there was another Executor under Age, tho' not joined in the Action, it might have been otherwiſe.

But in another Caſe, where the Teſtator made two Executors, one of Age, and the other *under Age*, one of them proved the Will, and Adminiſtration was granted to him during the *Minority*

* 10 H. 6. 31
22 H. 6. 59.
33 H. 6. 38.
35 H. 6. 35.
41 Ed. 3. 22.

† 19 H. 6. 65. Fitz Ex. 14.
16 H. 7. 4.

‖ 3 Leon 209
4 Leon 58.

‡ Dyer 3. B.

** Smith *verſus* Smith; Yel 130. 1 Brownl. 101.

Colborn *verſus* Wright, 2 Lev. 239. Jones 119.

of the other, as in the Case last mentioned, and he brought the Action alone; it was adjudged good, and that there was the like Judgment in *Hatton* and *Maskall's* Case; but if both the Executors had been of *full Age*, and one had proved the Will and brought the Action, it had been naught without joining the other; for tho' he refuse, he is still an Executor, and may administer when he will, therefore he must be named, or the Action will abate.

See it in Title Infant Postea.

But if the Testator makes two Executors, and if they refuse, then *R.* and *W.* shall be his Executors; those who are first named do actually refuse, they shall not be joined with the other in an Action, because 'tis evident the Testator did not intend all four to be his Executors, but two only, and that conditionally, if the two other should refuse.

(2.) *They must be joined in Actions being Defendants*; as for Instance: Debt was brought against two Executors on a Bond of the Testator, one of them pleaded *plene administravit*, and the other *non est factum*, and adjudged a good Plea, 7 *Ed.* 4. 8. 7 *H.* 4. 13.

17 H. 6. Fitz. Exor. 72.

Debt against one as *Executor*, and against the other as *Executor of an Executor*; it was objected, That the Action ought to be brought against the Survivor alone; but adjudged, That it lies against both; for the Executor who was *dead*, might have the Possession of the Goods whilst *living*, and if the Action should be brought against the Survivor *alone*, he might plead *plene administravit*, which would be a good Plea.

Fitz. Exor. 29.

But about 24 Years afterwards, the contrary Judgment was given in a like Case; and the Reason was, because the Plaintiff might have brought his Action whilst the other was living, and that it

it was either his Folly or Negligence to omit it, and therefore the Action would not lie againſt the Executor of the dead Executor *quod nota.*

The like Judgment was given many Years afterwards: ‖. The Teſtator made two Executors, who proved the Will, and one of them *died*, and then an Action was brought againſt the *Survivor*, and the Executor of the other, and for that Cauſe it was abated, and adjudged, That it ought to be brought againſt the *Survivor alone.* 4 Leon 193

Debt againſt one Executor, who pleaded that *R. B.* was made Executor with him, and was *not named* in the Writ, but he did not aver that *R. B.* had *adminiſtred*, and therefore upon Demurrer to this Plea it was held naught, for though where an Executor is Plaintiff, the *Defendant* may plead there was a Co-Executor with the Plaintiff *not named, &c.* without ſetting forth that he *adminiſtred*, becauſe 'tis not properly in his Knowledge, yet when an Executor is *Defendant*, he cannot plead it, without avering that the Co-Executor *adminiſtred*, becauſe 'tis a Thing within his Knowledge. Swallow *verſus* Emberſon, 1 Lev. 161. 1 Sid. 242. Poſtea 166.

Two Executors, one of them made his Will, and died, then the other Executor died Inteſtate, a Legatee ſued the Executor of him who firſt died in the Spiritual Court, who pleaded this Matter, and the Plea was refuſed by that Court, and no Prohibition was granted, for the ſurviving Executor is entitled to the whole Eſtate of the Teſtator by our Law, as may be ſeen in the Caſes before mentioned, and therefore by that Law the Action might be brought againſt him alone, without joining the Executor or Adminiſtrator of the dead Executor, yet it may be otherwiſe by their Law, for the Executor of him who died firſt, might have all the Goods in his Poſſeſſion, or he Guillam *verſus* Gill, 1 Lev. 164

might be *Executor de ſon Tort*, and the Matter is purely teſtamentary and triable there.

Oſborne verſus Croſland, 1 Sid. 272.

Three were bound in a Bond jointly, and an Action of Debt was brought againſt the Executor of one of them without ſhewing the other were *dead*; and upon Demurrer, the Queſtion was, Whether the Defendant ought to have pleaded, that the other were *living*: 'Tis clear, if he had been Plaintiff, he muſt have ſet forth that they were *dead*, to entitle him to the Action againſt the Survivor.

Two Executors cannot plead diſtinct Pleas, becauſe they repreſent but one Perſon, who could have but one Plea if he was living.

19 H. 6. 31. 22 H. 6 19. 33 H. 6. 38.

Debt againſt an Executor, 'tis no good Plea for him to ſay, that there is another Executor *not named*, and yet living, without ſetting forth that he *adminiſtred*; but where an Executor is Plaintiff, the Defendant may plead, that there is another Executor *living not named*, without alledging that he adminiſtred; for if one of them adminiſters, the Action muſt be brought in the Name of all; but where they are Defendants, the Action may be brought againſt him only who adminiſtred:

35 H 6. 35.

See *Pleas by Executors.*

(3.) *As to* Summons *and* Severance, *ſince Co-Executors muſt all join and be joined in Actions for the Reaſons before mentioned, therefore 'tis neceſſary, where ſome would ſue and others refuſe, that thoſe who ſo refuſe ſhould be ſummoned and ſevered from the reſt, who may then ſue without them.*

Price verſus Parkhurſt, Cro. Car. 420. 2 Roll. Abr. 98.

ff. There were ſix Executors named in the Writ, and three of them refuſed to proſecute, whereupon being ſummoned and ſevered, the other three declared on a Bond of the Teſtator, and upon *non eſt factum* had a Verdict and Judgment; the Defendant brought a Writ of Error, and it

was

was assigned for Error, That they being always Executors, notwithstanding the Summons and Severance, they ought to be named in the Judgment; but adjudged, That the Judgment shall be for those only who prosecuted, because it may happen that the Executors who were severed did not prove the Testament, and never will; and tho' 'tis true that they still continue Executors, yet by the Summons and Severance they are out of Court as to this Action.

But sometimes the Plaintiffs have been mistaken in the Summons and Severance, (*viz.*) by bringing it where it will not lie; as for Instance, They brought an Action of Trover as Executors against the Defendant for a Bond, and declared that it was lost in the Life-time of the Testator, but they laid the *Conversion in their own Time*; two of the Plaintiffs were severed, and a *Non pros'* entered against them; then the Defendant pleaded not guilty, and it was found against him, and Damages to 500 *l.* but upon a Motion in Arrest of Judgment, it was set aside, for Summons and Severance would not lie in this Case, because the *Conversion* (which was the material Thing) was laid *in the Time of all the Executors*; so that the Action was grounded upon the Possession of all of them, in which Case Summons and Severance would not lie, and consequently the Nonsuit of the other two was a Nonsuit of all, and if so, all the Proceedings afterwards were void.

Manly versus Lovell, Hard. 317.

(4.) *Where the Act of one shall be good against the other, or charge the rest.*

ff. Co-Executors being but as one Person, as before is mentioned, therefore the Law doth esteem most Acts done by or to any of them, to be the Acts of all of them; 'tis for this Reason that the Possession of one is accounted the Possession of all, as in the very Case last mentioned, that the

Payment of Debts by or to one, is the Payment of or to all; that the Sale or Gift of the Teſtator's Goods by one of them, is the Sale or Gift of all of them; and likewiſe a Releaſe of one is a Releaſe by all; but ſuch Releaſe muſt be before Judgment, for afterwards 'tis too late, becauſe *tranſit in rem judicatam.*

* Two had a Leaſe for Years as Executors, one of them ſelleth the Term, and the Sale was adjudged good; for each of them had an entire † Power to diſpoſe the whole, both of them being poſſeſſed of it in Right of the Teſtator, and for this Reaſon one of them cannot aſſign the Term to the other, becauſe he was poſſeſſed of the whole before.

* Pannel *verſus* Fenn, Cro. Eliz. 347. 1 Roll. Abr. 924. Moor 350. †Dyer 23 *B.*

* So one Executor ſhall be barred by the Acquittance of his Companion, becauſe each hath the whole, they being but as one Executor to the Teſtator; the Law is the ſame if one † confeſs the Action, for that ſhall bind the other for ſo much as he hath in his Hands.

* 48 Ed. 3. 14, 15. *See* Further's *Caſe.* Cro. Eliz. 471. † Lawry *verſus* Aldred, 2 Brownl. 183. Kelw. 23. S. P.

‖ Two Executors, one of them had a Bond by which *R. B.* was bound to their Teſtator, and that Executor who had the Bond, gave it to another in Satisfaction of his own Debt, and died; the ſurviving Executor brought an Action of Detinue againſt him who had the Poſſeſſion of the Bond, and it was argued, That tho' one Executor may give a Thing which he had in Poſſeſſion, or may releaſe a Debt, and it ſhall bind the Survivor, becauſe theſe are Things executed, and nothing remains for the other, yet by the Delivery of a Bond, the Debt itſelf (which is a Thing in Action) remains, and by Conſequence there is a Remedy for the Deed, eſpecially ſince it was given up to a Stranger, and not to the Debtor himſelf; but it was adjudged, that the Action did not lie; for 'tis agreed, That one Executor might

‖ Kelſick *verſus* Nicholſon Cro. Eliz. 478. 2 Roll. Abr. 46.

might have releaſed the Debt, and if ſo, he may diſpoſe the very Deed by which the Debt is created.

My Lord *Rolls* in reporting this Caſe, tells us, That by the Delivery of the Bond, the Debt did not paſs, but the *Paper*, and therefore this Action would not lie; which is ſo thin a Reaſon, that it deſerves no Anſwer.

(5.) *But in ſome Caſes the Act of one ſhall not bind or be good againſt the reſt.*

ſſ. Three Executors, one of them waſtes the Goods to a great Value, and died, an Action of Debt was brought againſt the Survivors, who plead *plene adminiſtraverunt*, and the Jury found that the dead Co-Executor had waſted the Goods, and that the Defendants had Goods of the Teſtator to the Value only of 16*l.* and adjudged, That they ſhall be charged with that and no more; for one Executor ſhall not anſwer the Waſte done by his Companion, and that the Act of one ſhall charge the other no farther than what he actually hath of the Teſtators, but not *de Bonis Propriis.* Hagthorn *verſus* Milforth, Cro. Eliz. 328. 2 Leon 209. Keilw. 23. B.

One cannot compel his Companion to accompt; this was Serjeant *Maynard*'s Opinion, and the Reaſon may be, becauſe both are poſſeſſed of the whole Eſtate; but Mr. *Siderfin*, who reports the Caſe, put a *Quare* to it, and compares it to the Caſe of Jointenants, where one may compel the other to accompt in *Chancery*; but the Caſes are not parallel; becauſe, tho' the ſurviving Jointenant is entitled to the whole, yet, whilſt they are living, each of them is entitled to a Moiety, and for that Reaſon he may compel his Companion to accompt; but Co-Executors, whilſt living, are not entitled to Moieties, but to the whole, unleſs they are made *reſiduary Legatees*, and in ſuch Caſe, if one dies Inteſtate, his Adminiſtrator 1 Sid. 33. Ante 162.

tor ſhall have a Moiety of the Surplus after Debts and Legacies paid, becauſe the Teſtator intended to both an equal Share, and that Intention will prevent the Survivorſhip.

Cox verſus Quanock, 1 Ch. Rep. 238.

(6.) *If any of the Co-Executors ſhould die pending an Action in which they are Plaintiffs, it ſhall abate, tho' he ſo dying was before ſevered for his Non-appearance on a Summons; the Law is the ſame if one dies where they are Defendants.*

3 H. 4. 18. There is an old Year-Book which makes ſome Difference in this Matter as to the Actions brought; for if 'tis in Detinue againſt two, the Death of one ſhall abate the Writ, but not in Treſpaſs.

(7.) *As to the Power of one who hath proved the Will, and of the reſt who refuſe,* it hath formerly been held, That if he who proved the Will had made his Executor, and died, ſuch Executor was become the ſole Executor of the firſt Teſtator, for the Power of the other Co-Executors was determin'd by the Death of their Companion; but that it had been otherwiſe if they had all proved the Will.

Dyer 160. 8.

My Lord *Dyer*, who reports this Caſe, puts a *Quære* to it; for it ſeems the Law was not clear in this Point at that Time, and it hath ſince been reſolved to the contrary.

ſſ. Several Executors were made, *one* of them proved the Will, and the reſt refuſed, he who proved it died Inteſtate, and another Perſon took out Adminiſtration, which was adjudged wrong; for the proving the Will by *one* made them all Executors, and that no other Perſon can adminiſter during their Lives, and becauſe it did not appear that thoſe who refuſed were dead, therefore the Bill was diſmiſſed.

Pawlett verſus Freak, Hardres 111.

And

And that they are all Executors notwithstanding their *Refusal*, appears by *Henslow*'s Case, (*viz.*) Debt was brought against Co-Executors, *one* of them *refused* before the Ordinary, and the rest proved the Will; he who refused may administer when he will, and therefore they who proved it ought to name him in every Action; but if they *all refuse*, and the Ordinary commit Administration to another, then 'tis too late, for in such Case they cannot prove the Will afterwards. Henslow's *Case*, 9. Rep. 39.

Robert made his Brother *William* Executor, and died; afterwards *William* made his Wife *Lucy* and one *Todd*, *joint Executors*, and died; *Lucy* alone proved the Will, and she made *two Executors*, and died; then *Todd* renounced the Executorship to *William*, and thereupon Administration of the Goods of *Robert* the first Testator was granted to the Defendant; but the *Executors of Lucy* insisting that it ought to be granted to them, it was decreed by the Delegates, That *Todd being joint Executor with Lucy*, and surviving her, the sole Right to the Executorship of their Testator *William* did survive to him, tho' he never acted as Executor; that this Right could not be divested, but by an actual Renunciation, and then, and not before both their Testator *William*, and also *Robert* his Testator are dead Intestate; and if so, then the Ordinary might grant Administration to the Defendant: And the Common Lawyers held, that if one Executor renounces before the Ordinary, and the other proves the Will, yet at Common Law, he who renounces may at any Time come in and administer; and tho' he never acted whilst his Companion was living, yet after his Death, he shall be preferr'd before any other Executor made by his Co-Executor; but the Civilians, That a Renunciation is peremptory by the Civil Law. House *versus* *Lord* Petre. 1 Salk. 311

Decreed

Decreed by Lord Chancellor *Harcourt*, that where there are Co-Executors, one alone may give a Diſcharge, and the joining of the other in the Receipt is not material, but that if they join in the Receipt, and one alone receives the Money, each who joins is liable to the whole as to Creditors, who are to have the utmoſt Benefit of the Law, but not as to Legatees, or as to thoſe who claim any Diſtribution who have no other Remedy but in Equity, ſo as to them the ſubſtantial Part is to be conſider'd, (*i. e.*) he who actually receiv'd the Money, and that ought to be regarded in Conſcience, ſo as to charge him and not the other, who never received any Part of it, nor the joining in the Receipt which is only Matter of Form.

Churchill *verſus* Hopſon, 1 Salk. 318.

Commiſſary.

HE is called by the Canoniſts *officialis foraneus* becauſe he exerciſes Spiritual Juriſdiction in thoſe Places of the Dioceſe which are fartheſt diſtant from the Cathedral, and from whence the Chancellor cannot call the People to his Conſiſtory Court *there*, without great Trouble.

But he is to ſupply the Juriſdiction of the Biſhop in thoſe remote Places of his Dioceſe which are only peculiar to him, and not ſubject to the Juriſdiction of the *Archdeacon*, for where they have a Juriſdiction either by Preſcription or Compoſition within their Archdeaconries, as in moſt Places they have, it may be inconvenient for the Biſhop to appoint a Commiſſary there, eſpecially ſince his takes *Reſtitution* Money yearly of his Archdeacons *pro exteriore juriſdictione*. See more under this Title in the *Rights of the Clergy*.

Compounding

Compounding a Debt.

THE Law will not ſuffer an Executor or Adminiſtrator to compound the Debts of the Teſtator to the Diſadvantage of any of his Creditors or others.

And if he is indebted to one in 40*l.* and to another in 30*l.* and dies, leaving not ſufficient to pay more than the 40*l.* and the Adminiſtrator agrees with the 40*l.* Creditor to pay him 10*l.* inſtead of the whole Debt, and having paid him that 10*l.* took an Acquittance for the whole 40*l.* yet that was not ſufficient to bar the 30*l.* Creditor, inſomuch that the remaining 30*l.* was held to be Aſſets in his Hands. 2 Vern. 396.

So where Debt was brought againſt an Adminiſtrator, he pleaded ſeveral Judgments obtained againſt him; the Plaintiff replied, That one was by Covin, and that the other had accepted a Compoſition for his Judgment, and that the Defendant had delayed to take a Releaſe. This was held a good Replication; for the converting to his own Uſe what remained above and beyond the Compoſition, and his delaying to take a Releaſe, was againſt the Office and Duty of an Executor, and that nothing ſhall be accounted to be adminiſter'd by him, but ſo much as he paid by Compoſition. Turner's Caſe, 2 Rep. 132.

Common. See *Tenants in Common.*

Compos mentis vel non.

'TIS requiſite to the making a good Will, That the Teſtator be *Compos mentis* at that very Time, that is, he ought to have a reaſonable Memory and Underſtanding to diſpoſe his Eſtate;

Moor 760.

Eſtate; and 'tis not ſufficient for him to have ſo much Knowledge as to make a poſitive Anſwer to a plain Queſtion, or to make one ſenſible Anſwer where many Queſtions are aſk'd; but he ought to have *Judgment* and *Diſcretion* to diſtinguiſh between Things and Perſons, which requires both a ſound and perfect Memory, and a reaſonable Underſtanding, and if this is wanting, the Will is void.

Marqueſs of Winchester's Caſe, 6 Rep. 23. 2 Salk. 552. *The Caſe of the Marqueſs of Winchester denied to be Law. See Poſtea* Partridge's *Caſe.*

My Lord *Coke* in * *Beverly's* Caſe, tells us how many Sorts of Men are *Non Compos mentis.*

* 4 Rep. 123.

ff. (1.) An Ideot *a Nativitate*, or a natural Fool.

(2.) One who was of perfect Memory, but by the Viſitation of God hath loſt it, as a *Madman.*

(3.) A *Lunatick* who hath ſometimes *lucid Intervals*, and at other Times is *Non Compos.*

(4.) A drunken Man, who in his Drink is *Non Compos.*

And as to Acts done by the two firſt of theſe Men, they ſhall not bind them; for an *Ideot* and a *Madman* cannot make any Will to diſpoſe either their Lands or Eſtate, but a *Lunatick* may during the Time of his *lucid Intervals*; becauſe at ſuch Time he may have *animum Teſtandi*, which is the moſt conſiderable Circumſtance to the making a good Will, and 'tis a Circumſtance which muſt be proved by Witneſſes, as his *Words*, *Actions*, and *Manner of Behaviour* at that Time, for by ſuch outward Acts the Intention may be known.

Conditions in Wills.

Conditions are Reſtrictions annexed to Mens Acts, qualifying or ſuſpending the ſame, and making them uncertain, whether they ſhall take Effect or not, and they differ from *Limitations*, for thoſe are the *Bounds or Compaſs* of an Eſtate, or the Time how long it ſhall continue, but in many Caſes *Conditions* have ſo near a Reſemblance to *Limitations*, that 'tis difficult to diſtinguiſh one from the other.

The Teſtator having three Daughters deviſed his Lands to his Wife for Life; and that after her Deceaſe, his Executors ſhould receive the Profits, till the Sum of 900 *l.* was received for the Preferment of his Daughters; and after the 900 *l.* received, then the Lands to remain to his right Heir Male; and *if his Heir Male* ſhall diſturb his Executors in receiving the Profits, then his Eſtate ſhall ceaſe, and the Lands ſhall be divided amongſt his Daughters then living; one *W. R.* was found to be his Heir Male, who made a Leaſe to the Plaintiff, who brought an Ejectment againſt the Daughter, but Judgment was given againſt him.

Aſkenhuſt *verſus* Carter, *In* 7 Jac. Hob. 34.

By the Civil Law *Conditions* are branched out into a Multitude of Diviſions, and Sub-diviſions, they are likewiſe divided by our Law, but I intending to confine my ſelf to ſuch only which I have found in Wills, and ſhall not mention any of thoſe Diviſions.

Firſt then I ſhall obſerve, That the Law allows *conditional Deviſes*, as well of Lands as of Goods, and that if the *Condition* is not performed, that the Heir in one Caſe may enter, and the Executor in the other may take Advantage of

of it; as if I deviſe Lands to *R. B.* and his Heirs, on *Condition* that he pay to *R. N.* 20 *l.* if the Money is not paid, the Eſtate to *R. B.* is determined, and the Heir may enter for the Forfeiture; but if the Deviſe had been to the *Heir at Law* himſelf, with ſuch a *Condition* annexed to his Eſtate, the Condition had been idle and void; becauſe, if it had been broken, no body could enter, for the *Heir* could not enter upon himſelf.

So where the Deviſe was, That if *R. B.* pay my Executors 50 *l.* then he ſhall have my Lands to him and his Heirs; this is a good Deviſe, and ſhall take Effect immediately after the Contingency happens, that is, as ſoon as he pays the 50 *l.* and the Heir at Law ſhall have it in the mean time.

The Law is the ſame in Relation to *Chattels*, (*viz.*) the Executor ſhall keep the Thing till the Condition is performed, and if 'tis broken, he ſhall take Advantage of it.

And becauſe theſe *Conditions* put Reſtraints upon Mens Acts, therefore they ought to be taken ſtrictly; 'tis true, there is a Caſe to the contrary, (*viz.*) a Leaſe was made of Lands for a Term of Years, *upon Condition*, That if he *demiſed* it for more than one Year, that the Leſſor and his Heirs might enter; and he *deviſed* it by his Will to his Son; this was adjudged a Breach of the Condition, tho' it was not within the Letter of it; but about 20 Years before there was a contrary Judgment, as reported by my Lord *Dyer*: *ff.* A Leaſe for Years was made on Condition, That the Leſſee ſhould not *alien* it to *R. B.* and he ſold it to *W. N.* who ſold it to *R. B.* this was held to be no Breach of the Condition, becauſe it ought to be taken *ſtrictly*.

Cole *verſus* Taunton, Golds 184.

Dyer 45.

I ſhall

I ſhall now proceed to ſhew,

(1.) *What Words make a Condition in a Will.*

(2.) *And what not.*

(3.) *What ſhall not be a Condition precedent.*

(4.) *What ſhall be Condition ſubſequent.*

(5.) *What ſhall be a void Condition.*

(6.) *Conditions which defeat an Eſtate.*

(7.) *What ſhall be a Condition, and not a Limitation.*

(8.) *Where the Heir, or he in Remainder, ſhall enter for a Condition broken.*

(9.) *And where he ſhall not enter.*

(1.) *As to the Words which make a Condition in a Will, they are various, and they are as follow:*

ff. The Teſtator being ſeiſed in Fee, and having two Daughters, deviſed his Land to his eldeſt Daughter and her Heirs, *That ſhe pay* to her youngeſt Siſter yearly, 30 *l.* this is a Condition, and for Non-payment the youngeſt Siſter may enter into a Moiety, for otherwiſe ſhe hath no Remedy for the Annuity.† Crickm: re *verſus* Paterſon, Cro. Eliz. 146. 1 Leon 174. 1 Roll. Abr. 410. † Ward *verſus* Browning

This Caſe is cited in * *Bullen*'s Caſe, and the Reporter tells us, that the eldeſt Siſter ſhould have all the Land 'till Default of Payment, *&c.* and then the youngeſt ſhould have a Moiety by Way of *Limitation*, which muſt be a Miſtake. Popham 12. *Gold. 134

If the Deviſe had been *paying* to her younger Siſter 30 *l.* or *ea Intentione*, that ſhe pay her ſo much, it had been a *Condition*, for generally the Word *Paying* makes a *Condition* in a Will. Co. Litt. 236. *B.*

But it hath been a Queſtion, whether 'tis not qualify'd by a Clauſe of Diſtreſs, *viz.* there was a Deviſe of Houſes in *London*, upon *Condition*, that the Deviſee pay yearly a certain Rent iſſuing out of the Premiſſes to his Wife for Life; and if the Rent ſhould be arrear for ſix Weeks, that then ſhe *might diſtrein*: The Rent was arrear, and the *Heir* of the Teſtator enter'd for a Breach of Dyer 348

the Condition, and it was adjudged lawful, and that the Clauſe of Diſtreſs had not qualified that Condition which was annexed to the Eſtate, but that it was determin'd upon the Breach thereof.

Lane 58. 'Tis to be obſerved, that there was an *expreſs Condition* in the Caſe beforementioned; and that if it had been a *Condition by Implication*, then the Clauſe of Diſtreſs would have taken away the Force of ſuch a Condition, and have made the Word *Paying* to be no Condition.

Street *verſus* Beale, Lane 56. 1 Roll. Abr. 411. As for Inſtance, a Deviſe to *R. B.* for Life, *paying* to *W. N.* the annual Rent of 6 *l.* half yearly, and if 'tis behind, that then the Lord may *diſtrein*; this is no Condition, becauſe the Clauſe of Diſtreſs limited for Non-Payment, *&c.* qualifies the Force of the Word *Paying*, which otherwiſe would have made a Condition.

Michell *verſus* Dunton, 2 Leon. 33. (2.) *The Words following do not make a Condition.* Leaſe for Years, with a Clauſe of Entry for Non-payment of Rent, and ſeveral other Covenants on the Part of the Leſſee; afterwards the the Leſſor deviſed that the Leſſee ſhould have the Lands for 31 *Years* (accounting the firſt Years not expired as Parcel) yeilding the like Rent, and under ſuch Covenants as in the former Leaſe, and by the ſame Will deviſed the Inheritance to another; the Queſtion was, Whether the Deviſee ſhould hold over the Land for the Term Increaſed, as he held it before; or if the Law ſhall conſtrue the Words of the Will to be a Condition: Adjudged that the Words cannot make it a Condition, for a Condition is a Thing odious in the Law, which ſhall not be created without ſufficient Words.

Gibbons *verſus* Marlti-ward, Moor 594. *ſſ.* Deviſe in Fee to Huſband and Wife, who was the Daughter of the Teſtator, upon Condition, That within 10 Years, they ſhould give as much Land as was worth 100 *l. per Annum* to *R. B.* and

if

if they fail, the Eſtate deviſed to them ſhall ceaſe, and then he gave the ſame to his Executors and their Heirs *upon Truſt*, That they ſhould ſtand ſeiſed thereof, to the ſame Uſes: The Huſband within the 10 Years, made a defective Conveyance of Land to that Value, which was perfected after 10 Years; adjudg'd, That the Executors might enter, and take the Lands by Virtue of this Deviſe, and that the Words *Upon Truſt* do not make a Condition annexed to their Eſtate.

So where the Teſtator deviſed his Lands in Fee, upon *Truſt and Confidence*, That the Deviſee ſhould out of the Profits, build a Free School, and pay ſo much Money to the Maſter, and ſo much to the Uſher; the Profits were diverted to another Uſe, and no School built; adjudg'd, this is no Condition, of which the *Heir* might take any Advantage upon the Breach thereof, for it was an expreſs *Truſt* and *Confidence*.

And this ſeems agreeable to former Reſolutions in the like Caſes.

As where the Deviſe was to his Wife for 30 Years, *to the Intents and Purpoſes* following, (*viz.*) *I will, that ſhe out of the Profits pay* yearly 30 *l.* to *R. B.* during the Term, whom he appointed to pay ſome Legacies, and that ſhe ſhould be bound to the ſaid *R. B.* to perform the Will: The Wife paid the Legacies when ſhe ſhould have paid the Money to *R. B.* to pay it over to the Legatees, and therefore the *Heir* enter'd for the Condition broken; but adjudg'd, this was no Condition, but a Declaration of his Intent, for to what Purpoſe ſhould the Wife be bound to perform the Will, if this was not a Condition? Hobert *verſus* Spenſer, 1 And. 50. Dyer 163.

Deviſe of an Annuity of 5 *l.* to his Son *towards his Education and bringing up in Learning*. This is not a Condition, for if he is not bred up in Learning, he ſhall have the Annuity; becauſe 3 Leon 65.

the Words *Towards his Education*, ſhew the Intent of the Teſtator, and the Conſideration of the Payment of the Money; for he muſt neceſſarily know, that 5 *l. per Annum* was not ſufficient to maintain a Scholar in Learning.

(3.) *An expreſs Condition is divided into that which is precedent and ſubſequent.*

See the Caſe of Bertie verſus Lord *Falkland. Tit. Wills.*

A *precedent Condition* is ſuch as muſt be *fulfilled* before the Eſtate can veſt or take any Effect; as where the Deviſe is, that if *R. B.* pay 50 *l.* at *Michaelmas* next, after the Teſtator's Death, he ſhall have his Lands; or if he deviſe Lands to him for a certain Term of Years, provided, that if he pay 50 *l.* to *W. N.* at *Michaelmas*, as aforeſaid, then he to have the Land to him and his Heirs; in theſe Caſes, the Condition muſt be performed *before* the Eſtate is acquired, and therefore, theſe and ſuch like are called *Conditions precedent* or executed, becauſe they go before, and muſt be executed, or the Eſtate cannot veſt.

And becauſe there have been many Queſtions concerning Conditions of this Nature, I having ſhewed what is a *precedent Condition*, it may be neceſſary in the next Place, to give one Inſtance, what is not ſuch a Condition in a Will, which would have been one in a Grant.

Jennings *verſus* Gover, Cro Eliz. 219. 1 Leon 229.

ſſ. Deviſe of a Term for Years to *W.* and *if his Wife ſuffer him to enjoy it three Years*, then ſhe ſhall have all his Goods as Executrix, but if ſhe diſturb him, then he made *R. B.* his Executor; adjudg'd, that ſhe is Executrix immediately and within the three Years, for this being in the Caſe of a *Will*, ſhall not be a *Condition precedent*, as it would have been in a *Grant*, and ſo no Eſtate would ariſe 'till the Condition be performed; but 'tis a Condition to abridge the Power of the Wife to be Executrix to her Huſband,

band, if she did not perform that Part of his Will.

(4.) *A Condition subsequent, is when the Estate is executed, but the Continuance of such Estate dependeth upon the Breach or Performance of the Condition*; and because it followeth the Execution of the Estate, therefore 'tis call'd *Subsequent or Executory*, (*viz.*) The Estate is vested, but to be divested again upon Breach of the Condition; as for Instance, a Devise for a Term of Years to *R. B.* upon Condition, that he pay 20 *l.* to *W. N.* at *Michaelmas* next, after the Death of the Testator, otherwise the Devise to him shall be void, *&c.* in this Case, by the Performance of the Condition the Term will be kept and enjoy'd by *R. B.* otherwise not.

So a Devise to his Son and his Heirs, *if he shall live to* 21, provided, if he die before 21, Remainder over; adjudged, this was a *Condition subsequent*, and that the Estate in Fee vested in the Son immediately upon the Death of his Father, to be divested, if he did not live to 21. Edwards *versus* Hammond 3 Lev. 132.

(5). *In many Cases, Conditions have been adjudged to be feigned and void.*

ff. The Civil-Law distinguishes betweeen Conditions which relate to the Legatory, and those which depend on the Testator himself; the Breach of the one makes the Legacy void, but not of the other: As for Instance, the Words of the Will were, *viz.* I devise 100 *l.* to *R. B.* If he doth what I appoint in my Codicil, and he appoints him nothing, the Devise is good, and the Condition annexed to it, shall be taken to be *feigned* and void.

It shall be *void* likewise where the Testator parts with all his Interest, and then devises it over. As where he devised, that the *Prior and Convent of St.* Bartholomew, and their Successors, Dyer 33.

ſhould have his Lands *ſo as they pay Yearly to the Dean and Chapter of St.* Paul's *fifteen Marks; and if they fail, then their Eſtate ſhall ceaſe*, and the Dean and Chapter and their *Succeſſors* ſhall have the Land. This was adjudged a void Condition, becauſe by the Deviſe to the *Prior and Convent*, and to their Succeſſors, the Teſtator had parted with his whole Intereſt and Eſtate which he had in the Lands, therefore he could not deviſe over upon a Condition; for if it ſhould be a Condition, the Dean and Chapter could not enter for the Non-performance, but the *Heir* at Law, and that would be to defeat the Will.

But now 'tis common to limit a Fee after a Fee, upon a Contingency, which is call'd an Executory Deviſe.

Dyer 74. Conditions alſo which reſtrain the Authority given by a former Part of the Will, are void; as if a Man makes two Executors, provided that one of them ſhall not adminiſter his Goods, this is void.

1 Lutw. 797. So where there is a Deviſe to the *Heir at Law*, provided, he pay to *R. B.* 100 *l.* 'tis a void Condition, becauſe there is no Perſon to take Advantage of it if broken.

(6.) *There are likewiſe ſome Conditions which defeat an Eſtate.*

Spittle *verſus* Davis, Owen 855. Moor 271. 2 Leon 38. *See* 2 Leon 82. *Larges Caſe.* As where the Teſtator being ſeiſed in Fee, deviſed Part of his Lands to his eldeſt Son in Tail, and another Part to his youngeſt Son in Tail, proviſo, that *if any of his Children alien or leaſe the ſame, before they ſhall attain to the Age of* 30 *Years*, that then the other ſhall enter: But as 'tis reported by *Owen*, that then the other ſhall have the Eſtate, but did not limit any Eſtate in particular. The eldeſt Son enter'd in his Part, and *made a Leaſe of it before he was thirty Years old*, and the

the youngeſt Son enter'd upon him, and *ſold it*, before he was 30. But Serjeant *Moor* tells us, he only *made a Leaſe of it*; and thereupon, the eldeſt Son enter'd again: Serjeant *Moor* makes a *Quære* whether he could lawfully enter; but 'tis reſolv'd in *Owen* and *Leonard*, that he could not, becauſe the Proviſo extended only to the immediate Eſtate deviſed, and not upon any new Eſtate which might ariſe upon the Breach of the ſaid Proviſo or Condition; and therefore, when the younger Brother had enter'd for the Breach of the Condition, the Land was diſcharged of it; for otherwiſe it would go and come from one to another upon every Alienation in *Infinitum*.

The Father having 3 Sons, and being ſeiſed in Fee of Lands, deviſed Part of them to his Wife for Life, *upon Condition* that ſhe ſhould educate his Children in Learning and good Manners; Remainder to his youngeſt Son, in Tail, and died; the Reverſion of that Part thus deviſed, came to his eldeſt Son, and the Condition was broken, adjudg'd, this was not a *Limitation*, becauſe there were expreſs Words of Condition in the Will, but that the Deviſe over in Remainder, had deſtroyed this Condition; for if it had not, then the Heir muſt have enter'd to defeat the Eſtate to the Wife, for he is to take Advantage of a Condition broken; but in this Caſe, he could not defeat the Eſtate for Life, without defeating the Remainder; therefore, by limiting the Remainder over, the Condition was deſtroyed. 3 *Mar.* Dyer, Dr. Butt's *Caſe*.

(7.) *Conditions which qualifie or ſuſpend the Eſtate to which they are annexed, and which are not Limitations to determine it wholly, are as follow:*

ſſ. The * Teſtator being ſeiſed of Copyhold Lands deſcendable in *Burrough-Engliſh*, and having 3 Sons, * Curtis *verſus* Woolverſtone, 2 Cro. 56

Sons, deviſed it to his *ſecond Son* in Fee, *upon Condition to pay each of his Daughters* 20 *l. at their reſpective Ages of* 21; the Son was admitted, but did not pay the Legacies; adjudg'd, That this was not a *Limitation* of his Eſtate, ſo as to make it go to the younger Brother, who was inheritable by the Cuſtom; but 'tis a *Condition*, and the elder Brother ſhall enter for the Breach thereof. 'Tis true, if the Deviſe had been to the *elder Brother* upon the ſame Condition, then it would have been a *Limitation* and not a Condition, becauſe if it ſhould be expounded to be in a Condition, 'tis nothing; for it deſcends on the eldeſt Son, and ſo he is not obliged to perform it.

Parker's *Caſe.*

Deviſe to his Wife and her Heirs, upon Condition, that ſhe, by the Advice of Council, ſhould aſſign the ſame in ſome convenient Time to certain charitable Uſes, which in Truth, were prohibited by the Statute 32 *Hen.* 8. adjudged, that tho' the Uſes were prohibited by the Statute, yet if the Condition be not performed, ſhe ſhall forfeit her Eſtate, becauſe thoſe Uſes might have been ſettled by Advice of Council, by purchaſing a Licence ſo to do.

Allen *verſus* Rivington, Sid. 445. 2 Sand. 111

Deviſe of his Lands to his Grandaughter *Ann Harriſon*, *if his Son* Thomas Hiblin, *have no Iſſue Male after the Deceaſe of his Wife*; and if he have Iſſue-Male at the Time of her Deceaſe, then he deviſed to the ſaid *Ann* 5 *l. Thomas Hiblin* had Iſſue *Richard*, who died without Iſſue in the Life-time of the Wife, and *Ann* and *Elizabeth* were his Siſters and Coheirs; adjudg'd, that this was a *Conditional* Deviſe to *Ann Harriſon*, and that ſhe took nothing 'till the Contingency happened: But the Lord Chief Juſtice *Saunders*, who reports the ſame Caſe, tells us, that the Matter in Law did not come in Queſtion, for it appear'd by the Record, that *Ann Harriſon* had Priority of Poſſeſ-

ſion

ſion, and there was no Manner of Title found for the Defendants; for it was found, that they were Siſters and Coheirs to *Richard*, that was not to the Purpoſe, becauſe it was not found, that they were Heirs to the Teſtator; for admitting it to be an Eſtate Tail-Male in *Thomas Hiblin*, it was now ſpent.

So where the Teſtator deviſed his Land to another in Tail, *upon Condition that he ſhould not alien it*; and if he died without Iſſue, Remainder over to another in Fee; afterwards the Deviſee *ſold the Lands*, yet the remainder Man could not enter, becauſe this was a *Condition*, and not a *Limitation* of his Eſtate, and therefore the Heir at Law muſt enter. Skrine *verſus* Bond, 1 Roll. Abr. 412.

(8.) *And now it may be neceſſary to ſhew where the Heir may enter for a Condition broken, and where not.*

'Tis generally true, where a Condition is annex'd to an Eſtate by the laſt Will of the Teſtator, and that Condition is afterwards *broken*, the Heir at Law ſhall enter and take Advantage of it, becauſe by the Deviſe he hath receiv'd an Injury in that which would have deſcended to him, if there had been no ſuch Will.

The firſt Caſe that I find in the Books of this Nature, is not reſolv'd; it was thus, *viz.* the Teſtator owed 500 *l.* on Bond, and deviſed his Lands to his Sons in Fee, *upon Condition, that if they did not* pay the Debt, then he deviſed the ſame to one *Wilford*, and his Heirs, who was their Uncle, *upon Condition*, that he pay the ſaid 500 *l.* The Money was not paid by the Sons; the Uncle made his Executors, and died, and the Money being ſtill unpaid, the Queſtion was, If the *Heir* of the Uncle might enter, and perform the Condition? It was not reſolv'd. Wilford *verſus* Wilford, Dyer 128.

The

Randall *verſus* Miller, 1 Leon 298.

The Teſtator having made a Feoffment in Fee to the Uſe of himſelf, and his Heirs, *Anno* 21 *Hen.* 8. deviſed his Lands to his youngeſt Son, in Tail; Remaider to his eldeſt Son in Fee, upon Condition, that if his ſaid youngeſt Son, or any of his Iſſue, ſhould diſcontinue or alien his Eſtate, that then the Deviſe to him and them ſhould be void; the youngeſt Son made a Leaſe for Lives, according to the Statute 32 *Hen* 8. then he levied a Fine to the Uſe of himſelf and his Wife, and to the Heirs Male of their two Bodies, Remainder to the right Heirs of the Teſtator; adjudged, that by this Will, the Condition was annexed to the Uſe of the Eſtate, and by the Statute, it was now transferr'd to the Poſſeſſion, and by Conſequence, this Condition was alſo annexed to that, and that it was now broken by this Alienation; for it may be that this youngeſt Son had Iſſue by a former Wife, which Iſſue would be barr'd by this Fine, contrary to the Intent of the Teſtator; therefore the elder Brother may enter.

And ſince, it hath been ſeveral Times adjudged, and ſo is the Law that the *Heir* may enter.

Fox *verſus* Catlyn, Cro. Eliz. 454.

Ff. A Deviſe of Lands for Years *Reddendum & ſolvend'*, to another 20 *s.* yearly at *Michaelmas*, the Money was not paid; adjudged, this was a *Condition*, and that for the Breach, the Heir might lawfully enter.

Warren's Caſe, Dyer 127.

So where the Deviſe was of Lands to his Wife for Life, *upon Condition that ſhe would educate his Son at School, at her own Charge*, and inſtruct him in the Truth and good Manners until he came of Age; and after the Death of his Wife, he deviſed the ſaid Lands to his ſecond Son in Tail, Reverſion in Fee to his own right Heirs: The Wife did not perform the Condition, the eldeſt Son entred

entred after he was of Age (living his Mother) and adjudg'd, that his Entry was lawful: For by the Breach of the Condition, to which her Eſtate for Life was annexed, that Eſtate was determined, and the Heir ſhall take Advantage of it, but he ſhall have it only during the Life of the Wife; for the Remainder to the younger Son, is not deſtroyed by this Entry, becauſe 'tis created by a Will which makes it good, though the particular Eſtate for Life was not good, but upon a Condition to be performed.

So where the Teſtator deviſed a Term to a Perſon, *upon Condition that if ſhe long liv'd, and kept herſelf a Widow, and dwelt upon the Premiſſes*; here the Words make it an expreſs *Condition*, and the Intention of the Teſtator is certain; ſo that the Leaſe ſhall not determine upon the Death of the Deviſee. Sayer *verſus* Hardy, 1 Roll. Abr. 411.

The Teſtator having made a Leaſe of his Lands for Years rendring Rent, deviſed the Reverſion to *B. B.* in Fee, and by his Will declared his Intention was, that his Executors ſhould have the Land during the Leaſe, upon Condition, that they enter into Bond to pay 34 *l. per Annum* during the Term; the Bond to be made within 6 Months after his Death, to the ſaid *B. B.* by the Advice of his Overſeers. After his Death, the Executors ſhew the Will to the Overſeers, but they adviſed no Bond, and none was given by the Executors; adjudged, that this was a Condition, by which the Reverſion was veſted in the Executors, but that it was in *B. B.* 'till it was performed; which not being done within the the Time limited, *B. B.* in Reverſion, ſhall have the Rent. Trehein *verſus* Cleybroke, Finch 69.

(9.) *Where he may not enter. See the Caſe of* Hobert *and* Spencer antea.

I ſhall

I ſhall conclude this Title with a remarkable Caſe, but not relating to any of the Diviſions beforementioned.

Allen verſus Hill, Cro. Eliz. 228. 3 Leon 152.

If. The Teſtator being ſeiſed in Fee of a Houſe in *Cornhill*, deviſed it to his Wife for Life, Remainder to his Heir in Tail, Remainder to his Brother in Fee, *Proviſo, that if his Wife clearly depart out of* London, *and dwell in the Country, that then ſhe ſhall have a Rent out of it.* The Heir at Law and the Executor, before any Entry made by the ſaid Heir, releaſe to the Wife; adjudged, that this Releaſe could not enure to her Eſtate for Life, becauſe that Eſtate was determined by this *Proviſo*, before any Entry made, and then ſhe was but Tenant at Sufferance; for though there are no expreſs Words to make her Eſtate void, yet this being in a Will, is implied in the Words, *That then ſhe ſhall have the Rent*, which cannot be if her Eſtate for Life was not determined.

Gage verſus Ruſſel, 2 Vent. 352

Deviſe of Lands to her Executors to pay 500 *l.* out of them *to her Son*, provided, that if the Father did not give a ſufficient Releaſe to the Executors of all the Goods and Chattels remaining in ſuch an Houſe, then this Deviſe of 500 *l.* ſhould be void, as to the Son, and it ſhould go to her Executors: The Teſtatrix died; a Releaſe was tendered to the Father, but he refus'd to execute it; the Son exhibited a Bill againſt the Father, and the Executors, for this 500 *l.* and to compell the Father to releaſe; the *Lord Chancellor Finch* decreed the 500 *l.* to be paid to the Son, though the Executors inſiſted by their Anſwer, to have it as forfeited to them, upon the Refuſal of the Father to execute the Releaſe; for the Chancellor ſaid, that it was a ſtanding Rule in Equity, that a Forfeiture ſhould not bind, where the Thing might be done afterwards, or a Compenſation made for not doing

doing it; unless where there was a Devise over to another Person upon the Forfeiture of the first.

Contingent. See *Remainder and Executory Devise.*

Copartners. See *Jointenants.*

Costs.

'TIS regularly true, that where the Plaintiff shall be allowed his *Costs* if he recover, the Defendant shall likewise have his Costs if the Plaintiff is nonsuited, or a Verdict against him, except 'tis in the Cases of *Executors* and *Administrators.*

And in such Cases, if an *Executor* or *Administrator*, is *Plaintiff*, and is nonsuited, or a Verdict passes against him, he shall pay no *Costs.* The Law is the same where the Action is brought *against* an Executor, and the Plaintiff recovereth a Verdict; but in such a Case, if the *Plaintiff* is † *Nonsuited*, or a *Verdict* against him, the *Executor Defendant* shall have his Costs, and this may be seen in the Cases following.

Yel. 168. 1 Vent. 94. † Fetherston *versus* Allibon, Cro. Eliz. 503.

Assumpsit against an Administrator, upon a Promise of the Intestate; he pleaded *quod ipse non assumpsit* instead of the Intestate; after a Verdict a Repleader was awarded, but no Costs of either Side. 2 Vent. 196

If. An Administrator brought an Action on the Case, and declar'd in the *Detinet*, and was nonsuited, but yet he Paid no Costs, tho' he had not set forth that the Debt was due to the Intestate; for since the Action was brought in the *Detinet*, it shall be so intended, and that it was brought in his Right. Barret *versus* Winchcomb. 2 Cro. 361.

So

Hayworth *verſus* David, 2Cro.229, 361. Yel. 168.

So where an Executor brought Debt, and the Defendant pleaded *Non eſt factum*, and had a Verdict; this was adjudged to be not within the Statute 4 *Jac.* by which 'tis enacted, *That in every Action where the Verdict paſſeth for the Defendant, the Plaintiff ſhall pay Coſts*; that is, where the Plaintiff ſueth *in his own Right*, and not in the Right of another, of which he can have no certain Knowledge.

And though an Executor or Adminiſtrator may have ſome certain Knowledge of the Fact, yet if 'tis found againſt him, he ſhall pay no Coſts; as for Inſtance, Debt on a Bond was brought by an Adminiſtrator; the Defendant pleaded Payment to himſelf, and ſo it was found; thereupon the Defendant moved to have *Coſts*; but it was denied, becauſe the Action was brought in Right of the Inteſtate, though the Plaintiff of his own Knowledge, had no Right of Action.

Jewſter *verſus* Sanders, 1Vent.92. 2Keb.679.

Peacock *verſus* Peacock, Cro.Car29 Hutt. 78.

There are many Caſes more, where Verdicts have paſſed againſt Executors, who were Plaintiffs, but the Defendants could have no Coſts.

'Tis true, the Caſe of ‖ *Atkey* and *Heard* was to the contrary, *viz.* An Adminiſtrator brought Trover for the Inteſtate's Goods, and laid the Converſion *in his own Time*, and the Defendant had a Verdict and his *Coſts*, becauſe the Converſion which was the Ground of the Action, was laid *in his own Time.*

‖ Atkey *verſus* Heard, Cro. Car. 219. Jones 241.

Maſon *verſus* Jackſon, 3 Lev. 60.

But in *Maſon* and *Jackſon's* Caſe long afterwards, there was a contrary Judgment in the like Action.

ſ. In Trover by an Adminiſtrator, who declared, that *he was poſſeſſed* of the Goods, *&c.* and loſt them, here the Action was founded *on his own Poſſeſſion*; and tho' the Verdict was againſt him, yet

yet he paid no Costs, because it was brought in Right of the Intestate.

Assumpsit by an Executor for the Testator's Money received by the Defendant to the Use of the Plaintiff; he was nonsuited, but paid no Costs, because he could not bring the Action but as Executor; for supposing that it was received by the Defendant since the Death of the Testator; yet 'tis not Assets in him, 'till recover'd; 'tis true, in Trover and Conversion, in the Time of the Executor, if he is nonsuited, he shall pay Costs, because he need not name himself Executor; for the Goods are Assets in his Hands, though he never recover them; for if an Executor will not go on to Tryal, according to Notice given by him for that Purpose, he shall pay Costs. Eaves *versus* Mocato, 1Salk.314.

So where the Plaintiff as Executor, declared, that the Defendant was indebted to his Testator, and that upon Account between the *Executor and the Defendant*, he was found in Arrear, *&c.* Upon *Non Assumpsit* pleaded, the Defendant had a Verdict, but could never get his Costs, tho' it was objected, that the Action was founded on an Accompt between the Executor and himself; and the Reason was, because it was upon a Duty to the Testator; and the Plaintiff had made a Title as Executor, and that the Money recovered would be Assets. Bull *versus* Palmer, Jones 47. 2Lev.165.

So likewise if an Executor is Plaintiff in a *Writ of Error*, and the Judgment is affirmed, he shall pay no Costs.

If. There was a Judgment in Ejectment against the *Intestate*, and the Administrator brought a Writ of Error, the Judgment was affirmed, and though the Writ was in *Dilatione Executionis*, yet the Defendant in Error could not have Costs. Legg *versus* Richards, 1Vent.166

So

Gale verſus Till, 3 Lev. 375. 4 Mod. 244.

So where there was Judgment againſt the *Adminiſtrator himſelf* in the *Common Pleas*, and he brought a *Writ of Error*, and the Judgment was inſiſted, that the Defendant in Error ſhould have Coſts; becauſe the bringing the Writ of Error was in Delay of the Judgment, and it was the Adminiſtrator's own Act to bring it; but it was adjudg'd, that he ſhould have no Coſts.

Smith verſus Harmer, Cro. Eliz. 252.

So where a *Scir' Fac'* was brought againſt an Aminiſtratrix, who pleaded ſpecially, and upon a Demurrer to the Plea, there was Judgment againſt her; ſhe paid no Coſts.

Jenkins and Cox verſus Hill, Mod. Caſes 89. 1 Salk. 207.

But where an *Aſſumpſit* was brought by Huſband and Wife as Executors, for that the Defendant being indebted to them in 20 *l.* as Executors, *&c.* for ſo much Money had and received *to their Uſe*; he promiſed to pay, *&c.* upon *non aſſumpſit*, pleaded the Plaintiffs were nonſuited; and it was adjudged, that they ſhall pay Coſts upon the Statute 23 *Hen.* 8. for the Cauſe of Action did ariſe entirely ſince the Death of the Teſtator, (*viz.*) by the Receipt of the Money to the Uſe of the Plaintiffs.

Dean and Chapter.

A Dean is an Eccleſiaſtical Magiſtrate preſiding over ten Prebends or Canons, he is under the Biſhop, but is Chief of the Chapter; and theſe are to adviſe the Biſhop when the See is full, and to govern the Dioceſe in Time of Vacation, and at ſuch Time 'tis uſual for them to *grant Adminiſtration.*

36 H. 8.

But whether the See is full or not, they may grant Leaſes, and uſually do, but ſometimes they are void; as for Inſtance, the *Dean* of *Saliſbury* made a Leaſe of the Appropriation of *Meer*, to one *Chafyn* by theſe Words, *viz. The Dean with the Aſſent*

Dyer 40. b.

ſent and Conſent of all the Chapter; hath demiſed, &c. *ſealed with the Seal of the Chapter*, &c. Now if the Dean and Chapter together were Parſons Impar-ſonees of the Appropriation, the Leaſe is void; becauſe they ſhould have all joined in the Leaſe, for they had Power and Capacity ſo to do, and the Dean alone ſhould not ſign *Aſſenſu Capituli*, but if he alone was the Parſon in Right of his Deanry, then the Leaſe was good, and the Chapter had nothing to do but to aſſent to the Leaſe.

Debet & Detinet.

See *Coſts*. *Eſcape*.

'TIS a Rule in the Regiſter, that if an Executor ſells the Goods of the Teſtator, and brings an Action of Debt for the Money, it muſt be in the *Detinet* only, becauſe if he brings it in the *Debet*, he thereby ſuppoſes a Property in himſelf, which he cannot have as *Executor*, for that was in his Teſtator. Regiſter 140 a.

So where an Executor is *Defendant* in an Action brought againſt him for Money due in the *Life-time of the Teſtator*, it muſt be brought againſt him in the *Detinet* only.

But becauſe there are ſeveral Caſes where the Action ſhall be brought in the *Debet & Detinet*, I ſhall ſhew,

(1.) *Where in the* Detinet *only*.
(2.) *Where both in the* Debet & Detinet.

Where the Action ſhall be brought in the *Detinet* only; and as to that 'tis to be obſerved, That where an Executor is Plaintiff as Executor, though the Duty accrued *in his own Time*, the Action ſhall be brought in the *Detinet*, becauſe the Thing

or Damages recovered ſhall be Aſſets in his Hands. There are ſome Inſtances of this Matter in the Year Books, as *Anno* 19 *H.* 8. if an Executor brings an Action of Debt. it muſt be in the *Detinet* as well for what is due *after the Death* of the Teſtator, as for what was due to him *whilſt living*.

19 H. 8. 3.

Reynell *verſus* Loncaſtle, 2 Cro. 545. Hob. 264. 272.

So where Debt was brought by an Executor againſt the Defendant upon a Bond made to the Teſtator, it was adjudged, that the Action was ill, becauſe it was brought in the *Debet & Detinet*, when it ſhould have been in the *Detinet*, becauſe 'tis a Duty to him as Executor, and therefore he ought to demand it in that Right.

Sparke *verſus* Sparke, Cro. Eliz. 840. Owen 125. * Moor 666. Yel. 9. Noy 32.

So where the Leſſor made a Leaſe for Life, and another Leaſe to one *Sparke* for 99 Years if he ſhould ſo long live, to commence after the Death of Tenant for Life, and that if the Leſſee for * 99 Years ſhould die within the Term, then the Land ſhould *remain to his Executors or Aſſigns for* 21 *Years* after the Death of both the ſaid Leſſees. The Leſſee for 99 Years made a Leaſe for 21 Years to *R. B.* rendring Rent, and outlived the Leſſee for Life, and afterwards died Inteſtate; his Adminiſtrator brought an Action of Debt againſt the Leſſee for 21 Years in the *Detinet* only; and held well, becauſe the Title to the Action was derived from the *Inteſtate*, and upon the Contract made with him. But Juſtice *Telverton* and *Moor*, who report the ſame Caſe, tell us, That nothing was veſted in the Inteſtate, for the Term of 21 Years was only a Poſſibility, and if he made an Executor, he ſhould have taken the Eſtate by Purchaſe; for the Word *Remain* divides it from the Eſtate of the Teſtator.

Fruen *verſus* Porter, Sid. 224. 1 Lev. 250.

Debt by an Adminiſtrator againſt the Leſſee of the Inteſtate for Rent, incurred *in the Life-time of the Inteſtate*, and it was brought in the *Debet & Detinet*, when it ſhould have been in the *Detinet* only;

only; for where the Inteſtate hath a Term for Years, and makes an under Leaſe, and the Reverſion comes to his Adminiſtrator, the Action muſt be brought in the *Detinet* only, becauſe all which he recovers ſhall be Aſſets; ſo that 'tis a Fault to declare in the *Debet & Detinet*, but 'tis ‖ cured by a Verdict.

‖ *See* Comber's *Caſe*, poſtea.

And this agrees with the * Year-Book 11 *H.* 6. where it is held, That if Rent is due *in the Life-time* of the Teſtator, the Action muſt be brought in the *Detinet* only, but if any is in Arrear after his Death, it muſt be in the *Debet & Detinet*.

* 11 H. 6. 7. 16. 2 Cro. 411. S. P. Maule *verſus* Moody, Palm. 117. S. P.

So if there is † Judgment againſt an Adminiſtrator, and an Action of Debt is brought on that Judgment, it muſt not be in the *Debet & Detinet*.

† 11 H. 4. 56.

But it may be brought likewiſe in the *Debet & Detinet*, *viz.* The Teſtator was poſſeſſed of a Term for Years, the *Reverſion* whereof came to his *Executor*, who brought an Action of Debt in the *Debet & Detinet* for Rent incurred *in his Time*; and adjudged good, becauſe the *Reverſion* was immediately in him upon the Death of the Teſtator, and Aſſets in his Hands immediately to the entire Value of the Reſidue of the Term; but it had been otherwiſe, if the Suit had been commenced for a *Choſe in Action*, becauſe, in ſuch Caſe, 'tis not Aſſets till recovered, and in the Executor's Hands, and then it ſhall be in the *Detinet* only.

Trattle *verſus* King, Jones 169.

The Caſes before mentioned, wherein the Action muſt be brought in the *Detinet* only, are where the Executors or Adminiſtrators were *Plaintiffs*. I ſhall now give an Inſtance or two that the Law is the ſame where they are Defendants.

ſſ. A Termor made his Executor, and died, *the Executor aſſigned the Term*, and an Action of Debt for Rent was brought againſt the Executor himſelf,

Hellier *verſus* Caſbard, Sid. 265.

himſelf, for Rent incurred after the Aſſignment, and it was brought in the *Letinet* only as it ought, becauſe it was founded on the Contract of the Teſtator; but if the Executor had *not aſſigned* the Term, it ought to be brought againſt him in the *Debet & Detinet*, and ſo it muſt if it had been brought againſt the *Aſſignee*.

But if the Termor himſelf had aſſigned the Term, his Executor ſhould be charged in the *Detinet* only as long as he hath Aſſets; and ſo is *Walker*'s Caſe.

Leſſee for Years rendring Rent made his Executor, and died; adjudged, That the Leſſor may have an Action of Debt againſt the Executor for the Rent reſerved tho' he never entered, for he repreſents the Perſon of the Teſtator; and tho' the Rent be more than the Profits of the Land, yet he cannot wave it, but ſhall be charged with the Rent.

Houſe verſus Webſter, Yel. 103.

Leſſee for Years rendring Rent, made the Defendant his Executor, and died; the Rent was Arrear in the Time of the Executor, and then the Leſſor brought an Action of Debt againſt him in the *Debet & Detinet*; and adjudged good, for the Plaintiff hath Election to bring it in the *Debet & Detinet*, or in the *Detinet* only.

Rois verſus Mees, Stiles 79.

(2.) *It may now be neceſſary to ſhew where the Action ſhall be brought in the Debet and Detinet:* And as to that, I find there is ſome Difference where the Action of Debt is brought *againſt the Executor* upon the Bond of his Teſtator, and an Action of *Debt* for *Rent* reſerved on a *Leaſe*. For in the firſt Caſe it may be brought in the *Detinet* only, but in the other there are contrary Opinions, becauſe of the Inconvenience on both Sides; for if an Executor cannot wave a Term, and if the Rent reſerved ſhould be more than the yearly Value of the Land, and the Teſtator ſhould leave

leave no Aſſets, which often happens, in ſuch Caſe it would be hard to charge the Executor in the *Debet*, and make him anſwer the Rent out of his own Eſtate: On the other Side, if it ſhould be brought in the *Detinet* only, then if the Leſſor ſhould ſue for his Rent, the Executor might plead *plene adminiſtravit*, and with the Profits of the Land pay Debts upon Specialties, and ſo defeat the Leſſor.

To remedy which Inconveniencies it was reſolved firſt in *Hargrave*'s Caſe, that the Executor may be charged in the *Debet & Detinet*, and that the Land ſhall be intended to be of greater yearly Value than the Rent reſerved out of it; the Caſe was thus: Body *verſus* Hargrave, 5 Rep. 31. Cro. Eliz. 711. Moor 566.

If. A Leaſe was made rendring Rent, the Leſſee died Inteſtate, and an Action of Debt was brought *againſt* his Adminiſtrator in the *Debet & Detinet* for Rent, partly incurred in the *Life time of the Inteſtate*, and part *in the Time of the Adminiſtrator*. The Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, that the Action ought to be brought in the *Detinet* only, becauſe the Adminiſtrator did not take the Profits in his own Right, but in Right of the Inteſtate, and thoſe Profits ſhall be Aſſets in his Hands; but it was adjudged, That the Action was well brought in the *Debet & Detinet*, becauſe Part of the Debt became due *in the Time of the Adminiſtrator himſelf*. 2 Cro. 549. S. P.

'Tis thus reported by my Lord *Coke*, whoſe Book I have, which was formerly Juſtice *Crook*'s, at the End of which Caſe he hath noted with his own Hand, that this Judgment was reverſed in the *Exchequer Chamber*, becauſe the Action was brought in the *Debet & Detinet*.

But I find that the Reporters at that Time were not agreed that it was reverſed for that Reaſon; for Mr. *Bulſtrode* tells us it was for another Cauſe, 1 Bulſt. 22.

but doth not ſhew what that Cauſe was; but
Palm. 116. 'tis mentioned by Sir *Jeffery Palmer*, *viz.* That the Judgment was reverſed for a Fault in the *Venire facias*.

Smith *verſus* Norfolk, Cro. Car. 225.

But in another Caſe of the ſame Nature, Juſtice *Croke* and the reſt of the Judges were of the ſame Opinion, that it was reverſed, becauſe the Action was brought in the *Debet & Detinet*, when it ought to be in the *Detinet* only; for the Charge is only upon the Contract of the *Inteſtate*, which is very true, where the Action is brought againſt an Adminiſtrator.

And yet even in ſuch Caſe it was formerly adjudged, that the Action is well brought in the *Debet & Detinet*. For Juſtice *Croke* tells us, that the Judgment in *Hargrave*'s Caſe was reverſed becauſe the Action was brought in the *Debet & Detinet*; yet but twelve Years afterwards, there was the like Judgment given in the like Caſe.

Lord Rich *verſus* Frank, 2 Cro. 238. 1 Bulſt. 22.

ſſ. Debt was brought againſt an Adminiſtrator in the *Debet & Detinet* for Rent incurred *after the Death* of the Inteſtate; upon *Nil Debet* pleaded, the Plaintiff had a Verdict, and the Adminiſtrator moved in Arreſt of Judgment, that the Action ought to be brought in the *Detinet* only, becauſe it was brought againſt him as Adminiſtrator, and not for his own Debt, but it was held well † Royſton *verſus* Moes, Stiles 79, 52, 61. S. P. Caly *verſus* Joſlin, Allen 34. S. P. * Royſton *verſus* Corderoy, Allen 42.

† enough.

Upon the whole Matter, the ſafeſt * Way is to ſue an Executor or Adminiſtrator in the *Detinet* only; as for Inſtance, Debt was brought againſt an Executor for Rent *incurred after the Death of the Teſtator*, the Plaintiff had a Verdict, and becauſe it was brought in the *Detinet* only. *Hales* moved in Arreſt of Judgment, that it ought to be brought in the *Debet & Detinet*, becauſe nothing ſhould be Aſſets in this Caſe, but the Surplus of the yearly Value of the Land beyond

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the Rent reſerved, that the reſt of the Profits were received by the Executor as Tertenant; and therefore he ought to be charged as ſuch in the *Debet*, and not in the *Detinet* only upon the Privity of Contract of the Teſtator, for *Debet* theſe Profits, as well as *Detinet* the Surplus; but the Plaintiff had Judgment; for though it hath been often doubted whether an Executor ought to be charged in the *Debet & Detinet*, yet it never was a Queſtion, but he might be well charged in the *Detinet* only, becauſe the Inconveniency of ſuch a Charge is only to the Plaintiff himſelf; for by bringing his Action in the *Detinet* only, he can charge the Executor no farther then the Teſtator's Eſtate will anſwer, and hath waved the Advantage of demanding any Thing out of the Eſtate of the Executor, which he might have done, if the Action had been brought in the *Debet & Detinet*.

But it can never be brought in the *Detinet* for Part, and in the *Debet* for the other Part, as where Debt was brought againſt an Adminiſtrator for Rent due in the *Time of the Inteſtate*, for which the Plaintiff declared in the *Detinet*; and for 64 *l.* due in the Time of the Adminiſtrator himſelf, he declared in the *Debet & Detinet*. And upon a Demurrer it was adjudged, that the Action did not lie, becauſe it required ſeveral Judgments, *viz. de Bonis Teſtatoris* in the one Caſe, and *de Bonis Propriis* in the other, and ſo ought not to be joined, but that the Plaintiff ſhould bring ſeveral Actions. Salter *verſus* Cobbold, 3 Lev. 74.

Debt againſt an Executor for Rent in Arrear in the Time of the Teſtator; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That this Action was brought in the *Debet & Detinet*, which ought not to be; for an Executor may properly ſay that the Defendant *Detinet*, but *See* Caly *verſus* Joſſeline, S. P. Vandicoote's *Caſe* Stiles 52.

but cannot ſo properly ſay that *Debet*, becauſe 'tis the Debt of the Teſtator; but the Court inclined that it was well enough in the *Debet & Detinet*.

The Plaintiff, as Adminiſtrator, brought Debt againſt a Sheriff for an Eſcape in the Life-time of his Inteſtate; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That this Action was brought in the *Debet & Detinet*, when it ought to be in the *Detinet* only, becauſe the Plaintiff being an Adminiſtrator, doth not recover to his own Uſe, but to the Uſe of the Inteſtate.

Marrin *verſus* Henley, Stiles 232.

Debt againſt an Executor in the *Debet & Detinet* for Rent Arrear in his own Time, the Executor pleaded, That the Rent was worth more than the Land; adjudged a good Plea, if it had gone no farther, becauſe he ought to be charged in the *Detinet* only; tho' where the Land is of more Value then the Rent, he muſt be charged in the *Debet & Detinet*, according to *Hargrave*'s Caſe, for that which accrues in his Life-time; but in the principal Caſe the Defendant pleaded farther, that he tendered a Surrender of the Leaſe before the Time for which the Rent was demanded, which the Plaintiff refuſed to accept; and that he (the Defendant) had fully adminiſtred, and ſo demands Judgment of the Action; all which being frivolous, and he not relying upon that Part of his Plea which was good, Judgment was given againſt him.

Colton *verſus* Canon, 1 Vent 271

The like Judgment where an Executor had a Leaſe of Lands of leſs Value then the Rent reſerved, and an Action was brought againſt him in the *Debet & Detinet*, who pleaded, That he had not Aſſets, and that the Lands were of leſs Value then the Rent reſerved, and demanded Judgment if he ought not to be charged in the *Detinet* only, becauſe he cannot wave the Executorſhip as

Billinghurſt *verſus* Speerman, 1 [illegible] 297.

to

to the Leaſe, for he muſt renounce the whole or none.

Where an Heir is ſued upon the Bond of his Anceſtor, the Action ought to be in the *Debet & Detinet*, becauſe he himſelf is bound, and the Action is not meerly in *auter droit*. If it ſhould be brought in the *Detinet* only, 'tis ill, and ſo it will be adjudged upon a Demurrer to the Declaration; but if the Plaintiff hath a Verdict, 'tis cured by the Statute 16 & 17 *Car* 2. *cap.* 8. by which 'tis enacted, That ſeveral Matters ſhall be amended after a Verdict, which are particularly named in the Act it ſelf, and then follow theſe general Words, *viz. And other Matters of the like Nature*: But Mr. *Siderfin* puts a *Quare* to it, for he tells us, That by the omitting *Debet*, the *Nature* of the Action is changed. Comber *verſus* Wotton, 1 Sid. 342. 1 Lev. 224. *See* Fruen's *Caſe*, antea.

Debt for Rent againſt an Executor in the *Debet & Detinet*, the Action was laid in *London*, ſuppoſing the Leaſe to be made of Lands in *Oxon*, and that the Leſſee entred, and died, and the Defendant entred as Executor, and upon Demurrer to the Declaration, the Defendant had Judgment; for though he was ſued as Executor, yet he is charged as *Aſſignee* in the *Debet & Detinet*, upon the Privity of *Eſtate*, and not upon the Privity of Contract; and therefore the Action ought to be brought where the Lands lie. Cormel *verſus* Liſſett, 2 Lev. 80.

But where an Executor was Plaintiff it was brought in the *Debet & Detinet*, as for Inſtance, Debt for 300 *l.* for that the Plaintiff by Indenture, by the Name of *W. R.* Executor of *R. R.* did demiſe to the Defendant certain Lands which he had by Extent, for a Debt recovered by the Teſtator, Habendum for ſo many Years, rendring Rent, and for three Years Rent Arrear this Action was brought; the Defendant demurred to the Declaration, becauſe the Action was brought in Holman *verſus* Chute, p. 22 Jac. 2 Cro. 685.

the

the *Debet & Detinet*, upon a Leaſe of Lands which he had as Executor; but adjudged, That the Action was not brought by him as Executor, but upon his own Contract; for tho' he is named Executor in the Leaſe, the Rent was reſerved upon his own Contract, and he ſhall have *Debet* for it, as if he was ſeiſed in his own Right.

Debtee made Executor.

11 H. 4. 85. 22 H. 4. 21.

IT ſometimes happens that the *Debtor* makes his *Debtee Executor*; in ſuch Caſe *if he adminiſters*, the Action to recover the Debt is gone; for he cannot ſue himſelf, but he may *retain* ſo much of the Teſtator's Goods as will ſatisfy his own Debt.

Woodward *verſus* Darcie, Plowd. Com. 184. Dyer 185.

And ſo it was adjudged in the *Commentaries*, That he may ſatisfy himſelf by *Retainer* where the Teſtator leaves Aſſets, and that the Action is extinct, becauſe in Judgment of Law the Debtee is ſatisfy'd without it; for if he hath Goods in his Hands to the Value of his Debt, the Property of theſe Goods is changed by the Operation of Law, and he may *retain* them, but not as Executor.

Bond *verſus* Green, Godb. 216.

But this muſt be underſtood where the Debts are in equal Degree, for he ſhall not *retain* for a Debt upon ſimple Contract againſt Bond Creditors.

The Law is the ſame where the Debtee *adminiſters* to the Debtor, he may *retain* Goods of the *Inteſtate* in Satisfaction of his Debt; but where two are bound in a Bond, and one of them dies Inteſtate, and the Debtee adminiſters, he cannot ſue the other.

Trudgeon *verſus* Meron, Hutt. 128.

Aſhby *verſus* Child, 1 Roll. Abr. 940. Stiles 384.

And where there are no Goods which he can retain, he may have an Action of Trover or Treſpaſs againſt an *Executor de ſon Tort*, who hath poſſeſſed

poſſeſſed himſelf wrongfully of the Goods; he may alſo have an Action of Debt againſt ſuch a wrongful Executor, upon a Bond due from the Inteſtate, with an Averment, That none of his Goods came to the Plaintiff's Hands to ſatisfy the Debt; and that the Defendant, after the Death of the Inteſtate, ſeiſed all his Goods before Adminiſtration granted; now in ſuch Caſe he could not ſatisfy himſelf by Reteiner, becauſe there were no Goods come to his Hands to retain, and therefore the Action is not ſuſpended.

But tho' in the Caſe where the *Obligor* makes the *Obligee* his Executor, the Action is gone, as is before-mention'd, yet 'tis otherwiſe where there are two Obligors, and one of them makes the Obligee his Executor; as for Inſtance,

Two were jointly and ſeverally bound in a Bond to *R. B.* one of theſe Obligors made *W. N.* his Executor, and died, *W. N.* made *R. B.* the *Obligee* his Executor, and died; then *R. B.* brought an Action of Debt againſt the ſurviving *Obligor* upon this Bond, who pleaded, That the dead Obligor made *W. N.* his Executor, who made the Obligee his Executor, and that the Plaintiff had adminiſtred the Goods of the dead Obligor, but did not ſay to what Value; and upon Demurrer the Plaintiff had Judgment, for tho' the Caſe was no more than that one *Obligor* (where two were bound) made the *Obligee* his Executor, yet ſince the Bond was joint and ſeveral, notwithſtanding the Action was diſcharged againſt one, yet it lies againſt the other. Cockburn's Caſe, 2 Croſſe, 2 Lev. 73.

My Lord *Hobert*, in *Fryer* and *Gildridge's* Caſe, tells us, That if a *Debtor* makes the *Executrix* of the *Debtee* his Executrix, and leaves ſufficient Aſſets, the Debt is ſatisfy'd by *Reteiner*, and conſequently no new Action can be brought for the Debt, Hob. 10. Poſtea

Debt; and this agrees with former Resolutions in the like Cases.

Cro. Car. 372. Jones 345. Post. And in *Dorchester* and *Webb*'s Case it was resolv'd, That if the *Debtor* makes the *Debtee and another Executors*, and the *Debtee* refuseth to prove the Will, the Debt is not released; but if he administer, he may retain for his Debt.

Debtor made Executor.

If the *Debtee* makes the *Debtor* Executor, 'tis an Extinguishment of the Debt; for 'tis a Release by the Act of the Party himself.

But where a Man dies Intestate, and the Ordinary commits *Administration* to the *Debtor*, the Debt is not extinct, but it shall be Assets in his Hands as to Creditors, because the Ordinary hath 8 Rep. 136. no Power to discharge the Debt; and so is the third Resolution in Sir *John Needham*'s Case, That if Administration is committed to the *Obligor*, the Debt is not extinct.

See tit. Assets. It may be necessary in this Place to shew,

(1.) *In what Cases the Debt is released or suspended.*

(2.) *And in what Cases 'tis not released or extinguished.*

8 Ed. 4. 3. 20 Ed. 4. 17. Fitz. Exor. 32. 21 Ed. 4. 4, 5. Fitz. Exor. 38. (1.) If the *Debtee* makes the *Debtor and another* Co-Executors, and one of them makes his Executor, and dies, the surviving Co-Executor shall not have an Action to recover the Debt against the Executor of the Debtor, because the Debt was once extinct; for it could not be brought but in the Names of both the Co-Executors, notwithstanding one alone administred, and it could not be brought in both their Names, because the Debtor could not sue himself.

21 H. 4. 83. Fitz. Exor. 58. If the Debtee marries *one of the Executors of the Debtor, who had proved the Will*, the Debt is extinct; but if the Will had not been proved, the

Debt

Debt remains; becauſe, in ſuch Caſe, he might bring the Action againſt the other, without naming himſelf.

The Debtor by Bond took out *Adminiſtration* to the Debtee, and made *W. R.* Executor, and died; one of the Creditors of the Debtee brought an Action of Debt againſt this Executor; and adjudged, That the Action was well brought. Lockier *verſus* Smith, Sid. 79.

The Obligor was *made Executor by the Obligee*, who died; afterwards this Executor adminiſtred ſeveral of the Goods, but he himſelf *died before Probate of the Will of the Obligor*, and made his Wife Executrix; ſhe proved her Huſband's Will, and took out Adminiſtration to the Obligee with his Will annexed, and then ſhe brought an Action of Debt againſt the Heir of the Obligor, (Executor as aforeſaid) upon this Bond of his Anceſtor. The Queſtion was, That ſince this Obligor had adminiſtred Part of the Goods, tho' he died before Probate of the Will of the Obligee, by which he was made Executor, whether the Will was a Releaſe of the Debt? And adjudged that it was. It was objected, That when an Executor doth adminiſter Part of the Goods, and dies before Probate, and makes an Executor, that ſuch Executor cannot be Executor to the firſt Teſtator, but Adminiſtration muſt be granted to him with the Will annexed; which is very true, and the Reaſon is, becauſe ſuch Executor cannot prove the Will of the firſt Teſtator, for no Perſon can prove a Will, unleſs he is named Executor in the Will it ſelf; but if the firſt Executor had proved the Will, then his Executor might have been Executor to the firſt Teſtator, becauſe in ſuch Caſe there needs no new Probate; but in the principal Caſe, tho' the Executor died *before Probate*, yet by his adminiſtring ſome of the Goods, he had taken upon himſelf the whole Adminiſtration,

Adminiſtration, and was compleat Executor, becauſe all Payments made to him are good, and ſhall not be defeated, tho' he ſhould die before Probate; he may maintain Trover for any of the Teſtator's Goods; he may avow for Rent, where a Reverſion comes to him of a Term for Years, and for Rent accrued ſince the Death of the Teſtator, tho' not before; he may bring an Action of Debt for a Debt due to his Teſtator, and all this before Probate; ſo that the Law takes Notice of him as an Executor, and ſuch he is till Refuſal: Now this Executor was ſo far from a Refuſal, that he adminiſtred the Goods, and accepted the Executorſhip, and 'tis that which amounts to a Releaſe of the Debt; for where the ſame Hand is to pay and receive, that amounts to a Diſcharge; but this muſt be underſtood in the Caſe of an *Executor* who is made by the Act of the Party, and not in the Caſe of *Adminiſtrator*, who is made by the Act of the *Ordinary*.

Wangford *verſus* Wangford, 1 Salk. 299.

The Father and Son were bound in a Bond to *W. R.* who deviſed all his Goods to his *Son's Wife*, and made her *Executrix*, and died, then the Son died, and afterwards the Wife died Inteſtate; adjudged, That the Obligee, by making the Wife of one of the Obligors * Executrix, had ſuſpended the Action ſo long as the Executorſhip continued, and a perſonal Action being once ſuſpended by the Act of the Party himſelf, is quite extinct; and tho' the Debt due on this Bond (being a *Choſe in Action*) cannot be transferred by a Deviſe, yet it ſhall enure as a Declaration of the Mind of the Teſtator, That the Debt ſhould be entinct.

Fryer *verſus* Gildridge, Moor 855. Holt 10. 1 Roll. Abr. 940.

* Alſton *verſus* Andrew, Hutt 128. S. P.

The ſame Point was adjudged afterwards in *Webb* and *Dorcheſter's* Caſe, (*viz.*) That if the *Debtee* makes the *Debtor* his Executor, the Debt is diſcharged, becauſe a perſonal Action once ſuſpended

Jones 345. Cro. Car. 372. Antea 204. Poſtea 207.

ſuſpended by the Act of the Party himſelf, is gone for ever.

And that which comes nearer to *Fryer* and *Gildridge*'s Caſe was likewiſe then reſolv'd, (*viz.*) That if two are jointly bound, and the Obligee makes one of them Executor, and dies, he cannot ſue the other.

Anno 30 *Car.* 2. There was a Caſe happened which may be properly inſerted in this Place.

ſſ. The Debtor was in Execution at the Suit of his *Creditor*, who afterwards died *Inteſtate*, and the Right of *Adminiſtration* fell to the Priſoner, who moved for a *Habeas Corpus* to be brought into Court in order to be diſcharged; it was agreed, That if there were no Debts owing by the Inteſtate, then by granting this Adminiſtration to his Debtor the Debt was diſcharged; but the Court refuſed to grant an *Habeas Corpus quia non conſtat de perſona*, they adviſed the Priſoner to renounce the Adminiſtration, and to get it granted to another, and then he might be diſcharged by a Letter of Attorney from ſuch Adminiſtrator to acknowledge Satisfaction, for he could not make a Letter of Attorney to diſcharge himſelf. Baillie's *Caſe*, 2 Mod. 315.

(2.) *In theſe Caſes following the Debt is not releaſed or extinct.*

If the *Debtee* makes the *Executrix* of the *Debtor* his *Executrix*, and dies, this is no Extinguiſhment of the Debt, becauſe the Executrix is intitled to the ſame, not in her own Right, but in the Right of another. 11 H. 4. 83.

The ſame Point was adjudged many Years afterwards in *Dorcheſter*'s Caſe, (*viz.*) *Webb* and *Dorcheſter* became jointly bound to *Ann Row*, in a Bond for Payment of 260 *l.* *Dorcheſter* made his Wife and the ſaid *Ann Row* Executrixes, and died; *Ann Row* the Obligee renounced, but the Widow of *Dorcheſter*, who was Co-Executrix with *Ann* Dorcheſter *verſus* Webb, Cro. Car. 372. Jones 345.

Ann Row, administred all the Goods of her Husband, and afterwards was made Executrix to *Ann Row* the Obligee, who died, and then she brought an Action of Debt against *Webb* upon this Bond; and adjudged, amongst other Things, That it was well brought, (*viz.*) That where the Debtee makes the *Executrix* of one of the Debtors her *Executrix*, the Debt is not discharged, because she hath it in *auter droit*.

Vide versus Rumsey, Vel. 160.

Anno 7 *Jac.* the *Debtor and another* were made Executors by the Debtee who appointed by his Will, That out of the Debt due from them to him, they should pay certain Legacies; adjudged, That the Legacies were recoverable in the Spiritual Court; for by making the Debtor Co-Executor with another, the Debt is not extinct as to the Legatees, but shall be Assets in Hands to satisfy their Legacies, as well as to pay Creditors, tho' 'tis true the Co-Executor hath no Remedy against him.

Philips versus Philips, 2 Ch. Rep. 292.

So where the Testator devised several Legacies, and the *Residuum* of his personal Estate to *R. B.* and made *W. N.* his Executor, and died, which said Executor was Debtor to the Testator in 400 *l.* now tho' it was insisted that the Debtee having made the said Debtor his Executor, the Debt was by that Means discharged, and so the 400 *l.* was no Part of his personal Estate, and if so, then there was no *Residuum*, and that there was sufficient besides to pay all Debts and Legacies; yet it was decreed against the Executor, That he should pay the 400 *l.* to *R. B.* to whom the *Residuum* was devised as aforesaid.

So that upon the whole Matter, where the Debtee makes the Debtor Executor, and devises several Legacies to be paid, or oweth several Debts at the Time of his Death, the Debt shall not be extinct as to the Legatees, but is recovera-

ble

ble by them, and in the first Place shall be Assets in his Hands to satisfy the Creditors.

Neither is the Debt extinct by granting Administration to the Debtor, especially if there is a Will.

As where an Executor brought an Action of Debt against the Defendant, who pleaded, That the said Executor was cited to appear before the Ordinary to prove the Will, but made default, and thereupon the Ordinary committed *Administration* to the Defendant, by Virtue whereof he did administer, and so the Debt was extinct; but adjudged, That by a Probate of the Will after the Administration granted, that Administration might be defeated, and tho' the Executor had made default, he might prove the Will at any Time. Baxter versus Bales, 1 Leon 90.

Debts, which are first to be paid.

See Devastavit, post. 224.

THere being several Degrees of Debts in our Law, it may be very prejudicial to an Executor or Administrator to pay them *inverso Ordine*, therefore 'tis necessary to shew in what Manner the Debts are to be paid.

(1.) *Judgments obtained in the Courts of Record at Westminster, are to be paid before,*
1. *Bonds.*
2. *Recognizances.*
3. *Rents.*
5 Rep. 29. Harrison's Case, Poster Tit. Judgments.

(2.) *Recognizances are to be paid before, and in some Cases after,*
1. *Bonds.*
2. *Judgments.*

(3.) *Bonds for Money are to be paid before Bonds to do collateral Acts.*
Statutes to perform Covenants, how such are to be paid.

(4.) *Debts upon ſimple Contract are next to be paid.*

(5.) *Legacies in the next Place.*

(6.) *The Priviledge of an Executor to prefer Creditors.*

'Tis certainly true, That *Judgments* recovered in the Courts at *Weſtminſter* ſhall be paid before Statutes, becauſe Judgments are Debts of higher Nature than any private Records, or than any Debts due upon Recognizances, for *indicium redditur in invitum*, and 'tis upon judicial Proceedings in theſe Courts of Record; and therefore ſuch Judgments are more notorious than Debts due on *Statutes* or *Recognizances*, which are likewiſe Debts on Record, but of a more private and clandeſtine Nature, as being acknowledged by the Conſent and Agreement of the Parties, therefore ſuch Judgments muſt firſt be ſatisfy'd, if there are no Defeazances to them.

And 'tis not Precedency of Time when the Debt was contracted, which gives Priority of Title, but he who firſt ſues Execution ſhall be firſt ſatisfied, but before Execution the Executor may pay which Judgment he will.

If *Judgments* are to be paid before *Recognizances*, 'tis plain they are to be paid before *Bonds*, for theſe are of an inferior Nature, (*viz.*) there was a Judgment in Debt againſt the Teſtator, and upon a *Sci. fa.* againſt the Executor, he pleaded, That before he had *Notice of the Judgment*, he had fully adminiſtred in paying Debts on Bonds, and upon Demurrer, it was adjudged an ill Plea, for he ought to take *Notice of Debts upon Record* at his Peril, and to pay them firſt.

Littleton verſus Hibbins; Cro. Eliz. 793.

7 Ed. 6. Dyer 80. 8. P. 6 Eliz. Dyer 3. 8. P.

They are to be paid likewiſe before *Rents*, eſpecially if ſuch *Rent* became due after the Death of the Teſtator; but if it was due and owing by the

1 Roll. Abr. 927.

the Teſtator *in his Life time*, then it ſtands in the ſame Equality with Debts on Specialties.

(2.) *But in ſome Caſes Recognizances may be paid before Judgments, but always before Bonds.*

ſ. There was a Debtor by *Bond* and alſo by a *Recognizance*, and Judgment was had upon the Bond; and before Execution the Obligor made his Wife Executrix and died; then his Goods were taken in Execution *upon the Recognizance*, and afterwards the Bond Creditor brought a *Sci. fa.* againſt the Executrix, to ſhew Cauſe why he ſhould not have Execution on the Judgment had on the Bond, to which ſhe pleaded Execution on the Recognizance, and it was held a good Plea, becauſe the Executrix is chargeable with the juſt Debts of the Teſtator; now the Debt upon the Recognizance was a juſt Debt, and the Execution thereon was an actual Recovery by due Courſe of Law, which ſhe could not prevent, eſpecially having no Notice of the Judgment on the Bond. *Anonymus*, 2 And. 157.

In the next Place, if there is a *Statute or Recognizance* for Payment of Money, the Executor may plead it to an Action of Debt on a Bond, tho' the Day of Payment on the Recognizance is not yet come, becauſe 'tis a certain and preſent Duty, tho' 'tis to be paid hereafter. *Robſon verſus Francis*, 1 Roll. Abr. 925. Bridgm. 79, 80.

So where there was a Statute for Payment of Money, with a Defeazance, reciting, that the Cognizee and the *Teſtator* became Sureties to *B.* for 100*l.* Debt due from the *ſaid Teſtator*, and it was thereby granted, that if *the Teſtator* paid the 100*l.* the Statute ſhould be void; adjudg'd, That tho' this 100*l.* was not in the Statute, but a collateral Sum to be paid to *B* who was a Stranger to the Statute, and not to be paid to the Cognizee himſelf, and ſo no Duty to him; and tho' 'tis probable that the Heir of the Teſtator might pay it, yet ſince the Statute was for Payment of a *Goldſmith verſus Sydnor*, Cro. Car. 362. 1 Roll. Abr. 926.

certain Sum of Money, for which the Executor might be charged, he may plead it to an Action of Debt upon a Bond.

Harrison's Case, 5 Rep. 28. 2 Roll. Abr. 925.

(3.) *But Bonds for Payment of Money shall be paid before the Statutes for Performance of Covenants, when none of them are broken, and probably never may*, for 'tis not reasonable that a Contingency, which may never happen, should be a Bar to a present and certain Debt.

Phillips *versus* Echard, 2 Cro. 35.

But if the Defendant in such Case should plead, That the Statute was for the Payment of 300*l.* or any Sum certain, which remains yet in Force, it shall be presumed to be made for a just Debt, and not for Performance of Covenants, and will be good till the contrary is shewn.

2 Roll. Abr. 927.

(4.) *Next to Judgments, Statutes, and Bonds, all Debts upon simple Contract are to be paid*; but as Servants Wages shall be paid before such Debts, so Legacies shall be paid after them.

Necton *versus* Sharpe, 2 Roll. Abr. 928. Cro. Eliz. 467. S. C.

(5.) *But Legacies shall be paid before a Bond to do a collateral Act*, as where the Testator was bound in a Bond to do such an Act, and having devised several Legacies, he died leaving only enough to satisfy the Bond if it should be forfeited; it was adjudged, this Bond was no Bar to the Legacies, because 'tis uncertain whether it would ever be forfeited.

Eales *versus* Lambert, Allen 38. Stiles 37.

So 'tis uncertain whether any contingent Covenant of the Testator's Will be broken or not; and tho' Legacies, which are meer Gratuities and no Duties, for which any Action will lie at Common Law; yet it was held, That if such Covenants are not broken, the Legacies may be paid; for a Covenant likewise is no Duty till broken, and it resting in Contingency, whether it may be broken or not, it shall be presumed that it will not be broken.

Postea 224. S. C.

But

But *Mortuaries* and *Reliefs* are to be paid before *Legacies.*

(6.) Laſtly, *An Executor hath the Privilege to prefer any of the Creditors before the reſt*; for if ſeveral Actions are brought againſt him of *equal Natures*, he may confeſs Judgment to which he will, and ſatisfy him firſt, unleſs 'tis in the Caſe of the King, who is entitled to a Debt on Record, as upon an Inquiſition found, or to Fines and Amerciaments in her Courts of Record, in ſuch Caſes the Executor hath not a Privilege to prefer any Creditor before her, but theſe Debts muſt be firſt paid. 1 Roll. Abr. 926. See Edgcomb verſus Dee, Vaugh. 89. 2 Inſt. 32.

So if there are ſeveral Bonds, the Executor may pay which he will firſt, except a Suit is commenced for one; but in ſuch Caſe, if pending that Suit, another Bond Creditor brings an Action againſt the Executor, he may prefer which he will, by confeſſing a Judgment to one of them, and he ſhall be firſt ſatisfy'd.

An Executor procured another to ſue him for a juſt Debt, and the Plaintiff obtained Judgment, which Judgment the Executor pleaded to an Action brought againſt him before that Time, and adjudged good; for there is a Difference between Covin and Conſent, and an Executor hath Liberty to pay one before another, even where he hath Notice of the Action; for tho' in Conſcience all Debts ought to be paid, yet in Point of Circumſtance there may be more Reaſon to prefer one, as if the Creditor be very poor. Blundivell verſus Loverdell, 1 Sid. 21.

Delegates. See *Appeal.*

BY the ſame Statute which prohibits Appeals to *Rome*, 'tis provided, That if Juſtice ſhould not be done in the *Archbiſhop's Court*, the Party may appeal to the *King in Chancery*, (which was 25 H. 8. cap. 19.

formerly done to the *Pope*) and thereupon the *Lord Chancellor* iſſues forth a Commiſſion under the Great Seal, directed to an equal Number of *Civilians* and *Common Lawyers*, who are to determine all Eccleſiaſtical Cauſes by Virtue of ſuch Commiſſion, and becauſe they are appointed or *delegated* by the King's Writ, they are called a *Court of Delegates*, and they have Authority to ſit upon Appeals in three Caſes.

(1.) *From a Sentence given in any Eccleſiaſtical Cauſe by the Archbiſhop or his Official.*

(2.) *From a Sentence given in any ſuch Cauſe, in Places exempt, commonly called the Peculiars.*

(3.) *From a Sentence given in the Admiralty Court in Suits Civil or Marine, by the Order and according to the Courſe of the Civil Law.*

In all theſe Caſes the *Lord Chancellor* may grant a Commiſſion of Courſe, but if the Sentence is by Virtue of a general Commiſſion from the King, in ſuch Caſe there lies no Appeal to him in *Chancery*, but it muſt be to him generally, as he is the ſupreme Head of the Church in all Cauſes, and this muſt be under his *Sign Manual*, and then the Lord Chancellor may iſſue out a Commiſſion of Delegates.

2 Roll. Abr. 223.

An Adminiſtration was granted, and an Appeal was brought to the *Arches*, and there it was confirmed, and ſo it muſt be remitted to that Court from whence the Appeal was made; but if it had been reverſed, then the Court is ouſted of its Juriſdiction, and the Court in which it was reverſed may grant Adminiſtration *de novo*, 'tis an Authority which they have by Virtue of the Statute.

Reeve verſus Denny, Latch. 85.

Deſcent,

Deſcent, and not by Purchaſe.

Deſcent in our Law ſignifieth an Order or Means whereby Lands or Tenements are derived to another from his Anceſtor: But ſometimes the Word hath a larger Extent as it ſtands in Oppoſition to *Purchaſe*, (viz.) when the Heir comes to the Eſtate by Way of *Limitation*; as for Inſtance, where the Anceſtor by any Conveyance whatſoever hath a Freehold for Life, and in the ſame Conveyance another Eſtate is given to his Heirs, either in Fee or in Tail, in ſuch Caſe the Word *Heirs* is a Word of *Limitation*, and he ſhall be in by Deſcent, and not by Purchaſe.

The Father was indebted by Bond, and being ſeiſed in Fee of Lands, he deviſed them to his Wife, until his Son ſhould come of Age, Remainder to his Son in Fee, and died, having no other Lands; adjudged, That the Son ſhall be in by Deſcent, and ſhall not have his Election to waive it, and ſo to be in by the Will. 1 Leon. 101 *Hyde's Caſe.*

Note, *Holt*, *Chief Juſtice*, held, That where a Deviſe is to the Heir at Law (as in the Caſe before mentioned) *paying ſuch Legacies*, and for default thereof, Remainder over; in ſuch Caſe, till default is made in paying the Legacies, the Son is in by *Deſcent*, and the Intereſt which he in Remainder hath, is only by Way of executory Deviſe; and ſo it was held in *Fell and Brown's Caſe*, where the Father deviſed his Lands to his youngeſt Son and his Heirs; and if he died without Iſſue, living the eldeſt Son, then to him and his Heirs; adjudged, That it was not by Deſcent, for 'tis hard to maintain either by Uſe or Deviſe a Remainder to a Stranger, after a Fee ſimple to one who is not Heir at Law. Mod. *Caſes* 241.

In a ſpecial Verdict in Ejectment the Caſe was, The Teſtator deviſed his Lands to his *Grandſon in Fee, upon Condition*, that he paid out of them 200*l.* to ſuch Perſon as his Wife by Deed ſhall appoint, and died. The Grandſon entered, and his Wife made no Appointment, and died; then the Grandſon died without Iſſue, and the Heir on the Mother's Side claimed, and brought an Ejectment, and the Defendant claimed under the Heir of the Father's Side. The Queſtion was, Whether the Grandſon took by *Deſcent* or by Purchaſe under the Will; and adjudged, That he was in by *Deſcent*, becauſe the Will gave him the ſame Eſtate as the Law would have done, if there had been no Will; 'tis true it was under the Poſſibility of a Charge of 200*l* which never happening, by Conſequence he takes as Heir at Law on the Part of the Father, and in this Caſe, *Gilpin*'s Caſe was denied to be Law.

Clerke *verſus* Smith, 1 Salk. 241.

So where an Heir taketh any Thing which might have veſted in his Anceſtor, altho it veſt in the Heir firſt, and never in the Anceſtor, yet the Heir ſhall be in by Deſcent.

So where *E. A.* doth covenant with me, That when *R. B.* ſhall convey unto him the Mannor of *C.* he will ſtand ſeiſed of the Mannor of *H.* to the Uſe of me and my Heirs; and I die, and afterwards *R B* doth convey unto *E. A.* the Mannor of *C.* in ſuch Caſe my Heir ſhall have the Mannor of *H.* by Deſcent.

Having given thoſe Inſtances wherein a Man ſhall be ſaid to be in by *Deſcent* and not by *Purchaſe*, I ſhall ſhew where in a Will he ſhall be in by *Deſcent*.

Preſton *verſus* Holmes, Stiles 148. 2 Roll. Abr. 626.

If. The Teſtator had two Sons by two Venters, and deviſed his Lands to his Wife for Life, and after her Deceaſe to *R. B.* his *eldeſt Son* and his Heirs; it was objected in this Caſe, That *R. B.* took

took by *Purchaſe* and not by *Deſcent*, becauſe he did not take it *preſently*, as he would have done if it had been by *Deſcent*, for he is to take it after the Death of his Mother; but adjudged, that the Deviſe was void, and that the ſaid *R. B.* took by *Deſcent*, becauſe nothing more is deviſed to him but what the Law gives him; and as to his taking it after the Death of his Mother, that makes no Alteration in the Eſtate limited to him, but ſhews when and in what Manner he ſhall come to it.

So a Deviſe of his Lands *to his next Heir at Law for ever, provided* he pay 100*l.* within Six Months after the Death of his *Wife, to ſuch Perſon as ſhe ſhall direct; the Queſtion was, Whether the Heir took by *Purchaſe* or by *Deſcent*: It was inſiſted, That he could not take by Deſcent, becauſe it was clogged with a Charge by the Anceſtor, *viz.* with the Payment of 100*l.* which made an Alteration of the Eſtate, becauſe he took it otherwiſe than the Law would have given it; but adjudged, That the Payment of the Money made no Alteration as to the Deſcent, it was only a Charge in Equity upon the Land, and that it would be a very violent Conſtruction of the Words, to make the Heir a Purchaſer.

Clarke *verſus* Smith. 1 Lut. 793

* See Poſtea *tit.* Purchaſe.

See *Fee-Simple.* See *Gilpin's* Caſe.

Deſcription, of the Things deviſed.

BY the Civil Law an erroneous Deſcription of the *Bounds, Limits, Place,* or *Situation* of the Lands deviſed, doth not prejudice the Deviſe it ſelf, ſo as the Teſtator is not *miſtaken* in the *Land deviſed.*

And with this agrees our Common Law, as may be ſeen in the Inſtances following:

(1.) *In*

(1.) *In an erroneous Description of the Thing devised.*

(2.) *In mistaken Descriptions of the Person to whom 'tis devised.*

(1.) *In an erroneous Description of the Thing devised, as to the Place and Estate.*

In Ejectment the Case was, that the Vender being seised in Fee, *contracted* with *T. T.* to sell his Land to him, but no Conveiance was made; then the Vendee sold the same Lands to *W. R.* before any Assurance made to himself; and *W. R.* devised the Lands in these Words, *viz. I bequeath to R. R. my Son all my Lands*, which I purchased of *T. T.* when in Truth they were not purchased of him, but under the Contract of the Vender, for *T. T.* had no Assurance; and adjudg'd the Devise was good.

H. 5 Eliz. Thorp versus Thompson. Cro. Eliz. 121.

ff. The Testator devised all the Profits of his Houses and Lands lying in the *Parish of Billing*, in a Street there, called *Brook street*, to his Wife for Life; and there was no such *Parish* as *Billing*, but the Land supposed to be devised, laid in *Birling-street*; adjudged, that the Profits of that Land did pass by this Will.

Pacy versus Knollis, 1 Brownl. 131.

The next erroneous Description of the Thing was *Anno* 2 *Car. viz.* A Devise of an *House* wherein *Henry Nicholls* dwelleth, called the *White Swan*; *Nicholls* had only the Use of the *Entry* and three Upper Rooms; yet adjudged, that the whole *House* passed; for the Word *House* in the Beginning of the Sentence, and the Conclusion by the Name of the *White Swan*, must extend to the *whole House*. If it had not been named by the particular Name of the *White Swan*, it might have been otherwise; but being so called, no Man can intend

Chamberlain versus Turner, Cro. Car. 129. Jones 195.

intend that the *White Swan* extended only to the *Entry* and *Three Rooms.*

So a Deviſe of his *Corner Houſe* in *Andover*, in the Tenure of *Hitchcock*, when in Truth it was not in the Tenure of *Hitchcock*, but of one *Binſon*, but *Hitchcock* was Tenant of the Teſtator's Houſe next adjoining to the *Corner-Houſe*; adjudged, That the Houſe which was really in the Tenure of *Hitchcock* did not paſs, but only the *Corner-Houſe*; for tho' that Houſe was not in the Tenure *Hitchcock*, yet the Deviſe is good, becauſe the Houſe was ſufficiently deſcribed before by the Name of the *Corner Houſe*, and the Addition, *viz.* in the Tenure of *Hitchcock*, is a plain Miſtake, and tho' falſe, 'tis but Surpluſage, and ſhall not vitiate that which was made certain before. Blake verſus Gold, Jones 379. Cro. Car. 447. 2 Roll. Abr. 613.

So where the Teſtator had two Tenements, called the *Upper-Houſe* and *Lower-Houſe*, and deviſed all his Tenements for Payment of his Debts, until his Grandſon was of Age, and afterwards he deviſed *All his ſaid Tenements*, viz. *Two Parts of the Nether-Houſe*, for raiſing 200 *l. the Remainder* to his Grandſon and his Heirs, *&c.* the Queſtion was, Whether the *viz.* and the Clauſe which followed, did reſtrain the Deviſe to the *Nether-Houſe*, or whether the *Whole* was deviſed to the Grandſon by the Words *All his ſaid Tenements?* and adjudged, that thoſe general Words comprehend the *Whole*, and the *viz.* is only directive how *Part of it* ſhall go. Bagnal verſus Abdett, 4 Mod. 140.

(2.) *A wrong Deſcription of the* Perſon *to whom the Eſtate is deviſed, doth not vitiate the Will, ſo as there may be a Certainty what Perſon the Teſtator intended.** * See Life, Eſtate for Life.

Ff. † A Deviſe to *W. B.* the *eldeſt Son* of *R. B.* although his Name is not *W. B.* but *J. B.* yet the Will is good, becauſe there is a Certainty of the Perſon. † 3 Leon 18, 19. Owen 35.

But

Brown *versus* Peake, 1 And. 306. Cro. Eliz. 817. Owen 84.

But if there are several Descriptions of one and the same Person, they must all meet at the Time of the Will executed, or the Devise is void.

ff. A Man having the Mannor of *Warners* and the Mannor of *Churchall*, devised *Warners* to the eldest Son of *Richard Foster* in Fee, and the Mannor of *Churchall* to *Margery Waters* for Life; and if she die, any of *Foster*'s Children then living, then he devised the Mannor of *Churchall to him that shall have the Mannor of Warners*. *Richard Foster* had two Children, *George* and *John*, the eldest died without Issue, *John Foster* sold *Warners*, then *Margery* died; adjudged, that he should not have the Mannor of *Churchall*, for there were two Descriptions of the Person who should take by this Will, *viz.* Richard Foster's *Child and such Child who should have the Mannor of Warners* at the Time of the Death of *Margery*, and both those Descriptions ought to meet in the Person at the Time of the Devise executed, which could not be in this Case, because, tho' the Person was *Richard Foster*'s Child, yet he had not the Mannor of *Warners* at the Time of the Death of *Margery*, for he had sold it in her Life-time.

Ron *versus* Smith, Cro. Eliz. 539.

So where the Testator had Issue a Son and a Daughter, and he devised his Lands to his Son in Tail, and if he dy'd without Issue, that it should remain *to the next Heir of his* †*Name*: The Son dy'd without Issue, the Daughter was then marry'd; and adjudged, that the next Heir Male shall have it, and not the *Daughter*; for tho' she was the *next Heir*, she was not of *his Name*, that being lost by her Marriage.

† *See* postea pl'ito 26.

Jolson's Case, Cro. Eliz. 576.

The like Resolution was in *Jolson*'s Case, *viz.* the Devise was to a certain Person in Tail, Remainder to the *next of Kin of his Name*, and the next of Kin was the Brother's Daughter, who was marry'd; but it was held, that if she had been unmarry'd

unmarry'd at the Time of the Death of the Teſtator, the Deviſe had been good to her, tho' ſhe had been marry'd at the Time of the Death of the Tenant in Tail.

Anno 29 *Car.* 2. The Teſtator had a *Son* and a *Grandſon* both named *Robert*, and deviſed his Lands to his Son *Robert* in Fee (who dy'd in the Life-time of his Father) who had alſo given a Legacy by the Will to his Grandſon *Robert*. Afterwards the Teſtator new publiſh'd his Will, and declared that his Intention was, that *Robert* his *Grandſon* ſhould take by his Will inſtead of his *Father*: It was objected, that this new Publication of the Will by *Parol*, could not alter the Words of the *written Will*, ſo as to put a new Senſe on them; for *Son* and *Grandſon* are different Names of Appellation, and ſignify diſtinct Perſons; beſides, Lands muſt paſs by a *Will in Writing*, and *Robert* the *Grandſon* is not named in the *written Will*; but adjudged by three Judges, that a *new Publication* is equivalent to a * *new Writing*; and though the *Grandſon* is not within the Words of the Will, yet the Word *Son* is applicable to him, for he is a Son with a Diſtinction, but *Scroggs contra.*

Afterwards a Writ of Error was brought in *B. R.* *Scroggs* being then Chief-Juſtice; and the Judgment was reverſed againſt the Opinion of *Dolben*, *viz.* That no *Parol Averment* can carry the Lands to one Perſon, where, by the Words of the *Will in Writing*, 'tis plainly deviſed to another; and that in this Caſe, the Teſtator had diſtinguiſhed in the very Will between his Son and Grandſon, and that the new Publication, and Parol Declaration, would not make the Word *Grandſon* entred to *Son.*

As to a *general Deſcription of the Perſon*, this Caſe happened, *viz.* a † Deviſe to the Wife for Life,

Stead verſus Hertyer, 1 Mod. 267. Raim. 408. 2 Mod. 313. 1 Vent. 342. Jones 181. 2 Lev. 243.

* But that muſt be where the Words in the written Will are apt and proper, and do not diſagree with the Words in the new Publication; now here was no Grandſon in the written Will.

† Amner verſus Laddington, 1 And. 61. 2 Leon. 92. poſtea 283.

Life, and after her Death, to his *Children unprefferred*; these are *general Words*, but yet are a sufficient Description of the Persons who shall take.

Tayler verſus Sawyer, 2 And. 134.

But a Devise to his Wife for Life, and afterwards *suitui suo*, where the Testator had a Son and Daughter; this was held to be void, because the Word *Issue* being in the singular Number, 'tis uncertain which of his Issue he meant, either his Son or Daughter. But Justice *Croke* tells us, it shall go to the Son as most worthy; and with him agreed my Lord † *Hales*, who was of Opinion, that the Resolution in *Anderson* was a little too rank.

† 1 Vent. 229.

*Owen 35

But where *constat de Persond*, the * Devise is not void, as a Devise to a Corporation, though not by the incorporate Name: So a Devise to *R. B.* the *eldest Son* of *T. B.* though his Name is *W.* is good, because the other Words make a sufficient Certainty.

Cowden verſus Clerk, Moor 860. Hob. 29. 2 Roll. Abr. 839. 2 Roll. Abr. 416. antea.

The Testator had a Son, and a Daughter who had Issue only a Daughter; and he devised that his Lands should descend to *W.* his Son; and if he dy'd *without Issue* of his Body, then to his *right Heirs of his Name*, equally to be divided Part and Part alike. *George Cowden* his Brother was of his *Name*, but not his *right Heir*; the Daughter of his Daughter was his *right Heir*, but not of *his Name*: It was adjudged, that *W.* had an Estate Tail, and that the Will was void as to the Reversion, for that descended to *W.* who dying without Issue, it descended to his Daughter; for the Testator never intended *George* should have it, because it was to go to the next Heirs of his Name, *Part and Part alike.*

Desstavit.

Devaſtavit.

See *Feme-Covert.* See *Judgments.*

A *Devaſtavit* or Waſte in an Executor or Adminiſtrator, is when he doth miſemploy the Eſtate of the Deceaſed, and miſbehave himſelf in the managing thereof, againſt the Truſt repoſed in him; and this he may do in ſeveral Reſpects.

(1.) *If. When he payeth Legacies before Debts, and hath not ſufficient to pay both.*

(2.) *When he doth not pay Debts in Order,* viz. *thoſe upon Simple-Contract before Debts on Bond or Judgment.*

(3.) *When he releaſes a Debt or Duty before he hath received it, or an Action by which he might have recovered it.*

(4.) *When he fraudulently ſells the Goods at an under Value.*

All theſe, and ſuch like, are Waſte in the Executor, and will make him chargeable *de Bonis Propriis*, but not the one for the Act of another Executor, neither is an *Executor* of ſuch Waſting Executor chargeable for his * Waſte.

* See the Statute 29 Car. 2.

But in all theſe Caſes, if the Executor is ſued, and he pleaded *plene adminiſtravit* generally, or if he plead Specially, that he hath no more but to ſatisfy ſuch a Judgment, and the Iſſue is found againſt him: The firſt Judgment muſt be *de Bonis Teſtatoris*, and the *Fi Fa* muſt be to levy the Debt on his Goods in the Hands of the Executor, and the Coſts *de Bonis Propriis*; and upon the Return of the Sheriff a Special Execution doth iſſue to

to levy the Money *de Bonis Teſtatoris*, and if he hath waſted the Goods, then *de Bonis Propriis*.

Baker verſus Lambert. Allen 39. Stiles 37. 8. C.

It hath been a Queſtion, Whether 'tis a *Devaſtavit* to pay *Legacies*, without taking Security of the Legatees to repay it, in Caſe any contingent Covenants of the Teſtator ſhould be afterwards broken, becauſe Legacies are meer Gratuities, and no Duties, nor recoverable at Common-Law, but in the Spiritual Court; it was agreed on all Hands, if the Covenants had been broken before the Payment of the Legacies, it had been a *Devaſtavit*, but a Covenant is no Duty 'till 'tis broken, and 'tis reſting in Contingency, whether it may be broken or not; it ſhall be preſumed that it will not, and then this Inconveniency will follow, that it will obſtruct the Performance of the Will; for 'tis a certain and preſent Miſchief, not to pay Legacies when due; and if an Executor ſhould be bound to wait for a Breach of a Covenant which may never happen, he may continue in Suſpenſe for ever; and by this Means the Children may have no Proviſion or Maintenance.

Sir Woodcock verſus Herne, Gold. 142.

(2.) *To pay Debts* inverſo ordine *will be a* Devaſtavit; *which ſee in Title*, Debts which are firſt to be paid.

But if two Creditors ſue an Executor, he may confeſs Judgment to which he will firſt, and ſo Pleaſure his Friend, if he do it without Fraud; but if he is ſued on a Bond, and he will pay another Bond without Suit, 'tis a *Devaſtavit*.

Searle's Caſe, Moor 678.

(3.) *When an Executor releaſes a Debt* or Duty before he hath received it, 'tis a *Devaſtavit*, and it hath formerly been held, That if there was a Bond of 200 *l.* given to the Teſtator for Payment of 100 *l.* and after the Bond is forfeited, and the Executor upon Payment of Principal and Intereſt releaſes the Penalty, this is a *Devaſtavit*, for ſo much

Fitz. 91.

much as the Penal Sum amounted unto, more than the Executor received, * contrary to the Opinion of *Croke*, whoſe Reaſon was, becauſe the Executor had done nothing but what the Law would have compelled.

* Knivet. *verſus* Latham, Cro. Car. 490.

An Adminiſtrator *durante minore ætate* of an Infant Executor poſſeſſed himſelf of the Teſtator's Goods, the Executor when he came of Age releaſed unto the Adminiſtrator all Demands; now though the Goods never came to the Poſſeſſion of the Executor, yet the Releaſe is a *Devaſtavit*.

Kitley's Caſe, Godb. 29. Knivet. *verſus* Latham.

(4.) *Selling the Teſtator's Goods at an under Value*, makes a *Devaſtavit*, if it is done in a fraudulent Way; but if he ſell them under Value where more could not conveniently be had, † or if an Infant ſells at an under Value, 'tis no Waſte; neither ſhall the Sale of the Sheriff at an under Value, when he hath the Goods in Execution, in any wiſe affect the Executor.

Kelw. 59. a

† 3 Leon 243.

Having ſhewed what Acts amount to a *Devaſtavit*, I ſhall in the next Place mention ſome, *viz.*

(1.) *What will not be a* Devaſtavit.
(2.) *Where the* Huſband *ſhall be chargeable for the* Devaſtavit *of his* Wife.
(3.) *Proceedings againſt an Executor after Judgement and Return of the Sheriff.*

(1.) *If an Executor pay a Debt on a Bond* which was due at the Time it was paid, tho' the Teſtator had given Judgment for Performance of Covenants, and none of them broken at that Time, 'tis not a *Devaſtavit*.

Moor 752.

Neither is it a *Devaſtavit* to pay a Debt upon Simple Contract before a Debt on a Bond, if the Executor had no *Notice* of the Bond, which *Notice* muſt regularly be by *Action*, for he is not bound to take Notice of it himſelf, no nor of a

1 Mod. 175 3 Lev. 115

Judgment or Record which was againſt his *Teſtator*, becauſe he is not privy to Acts done either by or againſt him.

Hob. 265. If an Executor is made for a certain Time, and after that Time is expired, another is appointed by the Will. If the firſt Executor waſte the Goods, the ſecond ſhall be chargeable though he hath done no Waſte, becauſe he may have an Action againſt the other who did Waſte.

40 Eliz. Goldſ. 119 Eveling verſus Leveſon. The Queen was indebted to *W. R.* in 100*l.* for Muſkets, who took a Debenture for the Money, in the Name of *T. W.* and afterwards made an Executor, and dy'd. The Executor procur'd *T. W.* to releaſe, and ſurrender the Debenture to the Queen, and took a new one in his own Name: Adjudg'd, no *Devaſtavit* in the Executor: But it had been otherwiſe, if the Debenture had been taken in the Name of the Teſtator himſelf.

(2) *The Huſband ſhall be charged with a Devaſtavit of his Wife during her Widowhood, or at any Time* dum ſola, *as may be ſeen in the Inſtances following.*

Cro. Car. 519. *If.* A Widow who was an Executrix waſted the Goods in her Widowhood, and afterwards marry'd; the Huſband and Wife ſhall be charged; and if the *Huſband* had waſted the Goods after he had marry'd her; this is a *Devaſtavit* in the *Wife*, for it was her Folly to marry ſuch a Man; and in ſuch Caſe, if there is a Judgment obtain'd againſt them, the Survivors ſhall be charged alone, * becauſe by the Judgment the Nature of the Debt is alter'd: But if there is no Judgment had againſt them in the Life-time of the Wife, and the Huſband ſurvives her, the Huſband ſhall not be charged.

* Eyres verſus Coward, 1 Sid. 357.

Carter verſus Love, Moor 358. Owen 56. So if the Teſtator deviſe a Term of Years to one, and make his Wife Executrix; ſhe marries again, and her Huſband took a new Leaſe of the Leſſor: It was adjudged, that this Acceptance of the

the new Leaſe, was a Surrender of the old one, and a *Devaſtavit* in the Huſband.

And that the Huſband ſhall be charged with a *Devaſtavit* made by his Wife *dum Sola*, this Caſe happened, in which are all the Proceedings againſt them both.

ff. Debt againſt Huſband and Wife as Adminiſtratrix to her firſt Huſband, and Judgment againſt them, and upon a *Fi' Fa* to have Execution *de Bonis Inteſtati*, the Sheriff returned *nulla Bona* of the ſaid Inteſtate, and upon a Suggeſtion that they had waſted their Goods, the Plaintiff brought another *Fi' Fa'* againſt the Huſband and Wife, with a Clauſe in the Writ, *ſi ſibi conſtare poterit per Inquiſitionem* that they had waſted, then that the Sheriff *Scire Fecerit* the Defendants to ſhew Cauſe why the Execution ſhould not be *de Bonis Propriis*, as the uſual Courſe is, and this is called a *Scire Fieri Inquiry*. The Sheriff returned, That the Jury found the Wife had 100*l.* of the Inteſtate's Goods, which ſhe had waſted in her Widowhood, and that the Huſband had not waſted any, *& ſi devaſtaverunt* according to the Writ, they prayed the Diſcretion of the Court, and upon this Special Return, the Court awarded Execution *de Bonis Propriis* of the Huſband and Wife, becauſe he is to be charged for the Waſte done by his Wife. Knight *verſus* Hilton, Cro. Car. 603. 1 Roll. Abr. 931.

But where Debt on a Bond was brought againſt Huſband and Wife as Executors, and the Plaintiff declared upon a *Devaſtavit* by them, but upon Demurrer to the Declaration, the Defendant had Judgment, becauſe a *Feme Covert* cannot waſte the Goods during *Coverture*, though the Waſte of her Huſband ſhall charge her if ſhe ſurvive; but then it muſt be upon a *Judgment* obtained againſt him, and not on a *Bond*, on a bare Suggeſtion of *Devaſtavit*. Horſey *verſus* Daniel, 2 Lev. 145.

19 H. 6. 49. See 1 Leon 320. Cro. Eliz. 114. 2. C. Moor 236. 2. C. poſtea Tit. Feme-Covert. Groſſman and Read's Caſe,

(3.) *The old Books tell us, That if Judgment is had againſt an Executor; and if upon a* Fi' Fa' *to have Execution* de Bonis Teſtatoris, *the Sheriff returns that the Executor had ſold the Goods, and converted the Money to his own Uſe, a* Scire Fieri Inquiry *ſhall iſſue againſt him, to ſhew Cauſe why the Plaintiff ſhould not have Execution* de Bonis Propriis.

The Law is the ſame if the Sheriff return *nulla Bona* upon the *Fi' Fac'*; but if the *Judgment* is had againſt an Executor upon a *Demurrer*, the Sheriff cannot return *nulla Bona*, but a **Devaſtavit*, becauſe he had charged himſelf with the Goods by his own Plea, *viz.* by his Demurrer he hath confeſſed that he had Goods, *&c.*

*Cro. Eliz. 102.

And though upon a Judgment againſt an Executor, the uſual Execution is a *Fi' Fa' de Bonis Teſtatoris*, yet if upon a *Scire Fieri Inquiry* a *Devaſtavit* is returned, the Plaintiff may have an † *Elegit de Terris Executoris*, as well as an Execution *de Bonis Propriis.*

† Mead verſus Cheyney, Cro. Eliz. 216. Moor 299. 2 Leon. 188.

It hath been a Queſtion what is a good Plea to ſuch a *Scire Facias*; my Lord *Rolls* held, That *plene adminiſtravit* is good, becauſe the Proceſs is only to make the ‖ Defendant anſwer; and that it would be dangerous to plead *non Devaſtavit*: But the beſt Plea is to ſet forth, That *nulla Bona devenerunt ad manus, &c.* with which he could ſatisfy the Debt ſince the *Scire Facias* brought.

‖ Fitchet verſus Woolſton, Stiles 56.

But now the Courſe of theſe old Proceedings is alter'd, for *Debt* will lie againſt an Executor in the *Debet & Detinet*, where there is a *Judgment* againſt his Teſtator, upon a bare Suggeſtion that he had waſted the Goods; and ſo it was adjudged, *Anno* 16 *Car.* 2. in the Caſe of ‡ *Corey* and *Thin*, which was the firſt Action of that Nature. And my Lord *Hales*, who was then of Council with the Plaintiff, ſaid, he had better Succeſs in it than he expected; for he relied upon the old Books

‡ Corey verſus Thinn, 1 Lev. 147. 2 Sid. 102.

Books and grounded his Opinion on them; but he held this to be a ſpeedier Way than than the former Courſe of a *Scire Fieri Inquiry*, and that it had no manner of Inconveniency in it; for the Plaintiff muſt prove every Part of his Declaration upon the Trial of the Iſſue.

About two Years afterwards, the like Action of Debt was brought againſt an Adminiſtratrix, there being a *Judgment* firſt had againſt the Inteſtate, and adjudged good upon the bare ſuggeſting a * *Devaſtavit*; but that it would not lie without a *Judgment* had againſt the Inteſtate, but both together made the Action. Barnil verſus Richmond, Carter 2. * Wheatley verſus Lane. 1 Lev. 175.

Therefore, where the like Action was brought againſt an † Executor, upon a Bond of the Teſtator, without a Judgment againſt him; and upon the like Suggeſtion it was held that it would not lie, but that the Plaintiff muſt ſet forth a Judgment obtained either againſt the Teſtator, or the Executor himſelf, *de Bonis Teſtatoris*; and then, upon *nil debet* pleaded, he muſt prove an actual waſting, otherwiſe he will be Nonſuit. S. P. 1 Sand. 216. † Ent verſus Withers, 1 Vent. 315, 321. 2 Lev. 209.

In a few Years afterwards ſome Attempts were made to extend this Action a little farther, and that was againſt an Executor of an Executor.

ſſ. An Executor waſted the Goods of his Teſtator and died, leaving Aſſets, and making the Defendant his Executor, againſt whom the ‖ Action was brought upon the like Suggeſtion; but my Lord *Hales* would not ſuffer it; and therefore he adjudged, that ſuch Executor was not chargeable, becauſe it was a perſonal *Tort* in the firſt Executor, which died with him. Brown verſus Collins. 2 Lev. 110. ‖ Poſtea Tit. Executor of Executor.

But where the firſt Executor poſſeſſes himſelf of Goods *wrongfully*, as *Executor de ſon Tort*, and then waſtes the ſame, and dies, leaving Aſſets; it was the Opinion of the Chief Baron *Turner*, that his Executor ſhall be chargeable, becauſe his Teſtator Aſtry verſus Nevitt, 2 Lev. 133.

ſtator came wrongfully by the Goods; and therefore the Waſting ſhall not die with his Perſon.

30 Car. 2. cap. 7. This was a little before the Statute 30 *Car.* 2. by which it was enacted, *That if an Executor* de ſon Tort, *waſtes the Goods, and dies, his Executor ſhall be liable in the ſame Manner as his Teſtator would have been if he had been living.*

But the Lord Chief Baron's Opinion was contrary to my Lord *Hales* in *Brown* and *Collier*'s Caſe, and contrary to the Judgment of all the Barons of the Exchequer in * Sir *Brian Tuck*'s Caſe.

* 3 Leon 241.

† Biron verſus Berkley, 1 Lutw. 670. Moſt of the Caſes before-mentioned, were cited by the Council in † *Baron* and *Berkley*'s Caſe, which was an Action of *Debt* brought againſt Huſband and Wife, as Executrix of her former Huſband, ſetting forth, that the Plaintiff had obtain'd a Judgment againſt them, which was not ſatisfy'd; that the Wife died, and that Execution was awarded againſt the Huſband alone, who ſurvived; that after the Death of the Teſtator, ſeveral of his Goods, to the Value of the Debt in Queſtion, came to the Poſſeſſion of the Huſband and Wife as Executrix, which ſaid Goods the Huſband *in uſum ſuum proprium convertit & diſpoſuit.* Upon a Demurrer to his Declaration, the Queſtion was, Whether the Action did lie, or not, againſt the *Huſband?* And the Court inclined that it did not, there being only a bare Suggeſtion of Waſte; for if a *Devaſtavit* had been actually returned by the Sheriff, and a *Scire Fieri Inquiry* had been brought, and the Wife had died before Judgment obtained upon that Writ, her Husband ſhould not be chargeable *à fortiori*, where no Return is made, but only a bare Averment of Waſte, which is a Perſonal *Tort* in the Wife alone, and dies with her.

They all agreed, it was very hard, that the Debts of the Teſtator ſhould be unpaid, becauſe the

the Huſband had the good Fortune (as it was called) to bury his Wife; and therefore Serjeant *Levintz* deſired, That ſince the Court ſeemed willing to relieve the Plaintiff if they could; and that, ſince he might have a proper Remedy in *Chancery*, that he might argue for the Plaintiff the Equity of the Statute 30 *Car.* 2. which was granted; but before he argued it, the Defendant died.

Deviſe.

A *Deviſe* is that Act by which a Teſtator, gives or bequeaths his Lands or Goods by his laſt Will in Writing.

The Word *Deviſe* is applicable to *Lands*, and *Bequeath* to Goods; but I find, thoſe Words are promiſcuouſly uſed: And ſince the *Etymologiſts* will have it, that the Word *Deviſe* is derived from the *French*, *Deviſer*, or rather from the *Latin*, *Divido*, *viz.* to divide, or ſort in ſeveral Parts, it may ſeem more applicable to *Goods*, than Lands; for thoſe are uſually divided into more Parts than Lands.

Under this Title I ſhall ſhew,

(1.) *By what Words Lands and other Hereditaments may paſs by Deviſe, and what not.*

(2.) *What Chattels and Goods paſs by a Deviſe.*

(3.) *What Deviſes are void and fraudulent.*

But firſt, as to a Deviſe of Lands: Upon the Statute 32 *H.* 8. *viz.* the Teſtator cannot deviſe more than two Parts in three of Capite Lands; as for Inſtance, The Father being ſeiſed of a Mannor held in Capite, and of other Lands in Socage, made a Feofment thereof to the Uſe of himſelf, and his Wife, and their Heirs; it was found, that this Mannor came to two Parts of all

Finch *verſus* Tracy, 3 Leon 105

the Lands that the Teſtator had at the Time of the making the Feoſment; and that afterwards he deviſed the Socage Lands to his Wife for Life, remainder over; adjudged, that this Deviſe was void by the Statute.

Jernegan *verſus* Cornwallis, Cro. Eliz. 286.

So where a Tenant in Capite was ſeiſed of three Mannors, viz. of two in Fee, and of one in Tail, and deviſed all his Mannors to *W. R.* and died; adjudged, this was good for the two Mannors which he had in Fee, and void for the 3d.

* Kerry *verſus* Derrick, Moor 771. 2 Cro. 104.

It hath been adjudged that Lands will paſs by the Deviſe of Rents; as for Inſtance, the * Teſtator being ſeiſed in Fee of Lands and Tenements, made a Leaſe thereof for Years rendring Rent; and afterwards he deviſed in theſe Words, *viz.* As concerning the Diſpoſition of *all my Lands and Tenements*, I bequeath the Rents of *D.* to my Wife for Life, Remainder in Tail, *&c.* adjudged, that the Land paſſed by the Word *Rents*.

Gawen *verſus* Ranter, Cro. Eliz. 804. Moor 625.

But if a Rent is granted to a Man and his Heirs, *during the Life of another*, the Grantee cannot deviſe this *Rent* either at Common-Law, or by the Statute of Wills, which requires that the Teſtator muſt be ſeiſed of an Eſtate in *Fee-Simple* to make the Deviſe good; 'tis true, in this Caſe he had a Fee deſcendable to his Heirs during the Life of another; and this was not an abſolute Fee, and at the beſt but an Eſtate *per auter Vie*, to which the Statute doth not extend.

Roſe *verſus* Bartlet, Cro. Car. 292. * Stiles 279.

If a Man hath Lands in Fee, and is likewiſe poſſeſſed of a Term for Years of other Lands; and in the ſame Will deviſeth all his *Lands and Tenements* generally, the Term of Years doth not paſs, becauſe there are other * Lands to ſatisfy the Words of the Will.

So where the Teſtator was ſeiſed in Fee of a *Portion of Tythes in Holford*; and having no Lands or other Hereditaments there, he deviſed all his

Fee-Simple

Fee-Simple Lands whereſoever to his Brother and his Heirs; adjudged, That the *Tythes* paſſed by the Word *Lands*, for though they are collateral and diſtinct, and ariſing out of the Land, yet in Wills the Propriety and aptneſs of Words are not ſo much to be conſidered, as the Intention of the Teſtator, who in this Caſe did intend that he had ſome Fee-Simple Eſtate in *Holford*, becauſe he had nothing there which could ſupply the Words of his Will, beſides the Fee-Simple of this Portion of *Tythes*.

Where the Teſtator was never ſeized, but had only an equitable Right to Lands, they will paſs by a *Deviſe of his Lands*, as if he agreed for the Purchaſe of Copyhold Land; and purſuant to that Agreement they are ſurrendred out of Court to his Uſe, and he die before Admittance, having firſt made his Will, and deviſed all his Copyhold Lands to *R. B.* after his Death. It was decreed that the Lands ſhall paſs, becauſe the Teſtator had an Equity to recover them, and the Vendor ſtood ſeized for him till a legal Conveyance could be made. Davie *verſus* Beardſham 1 Ch. Rep. 39.

Deviſe of Goods, by what Words and by whom.

Adminiſtrator, { Cannot deviſe the Goods which he hath as Adminiſtrator.

Advowſon, { Which the Teſtator had for a Term of Years, and if an Incumbent purchaſe an Advowſon in Fee, and deviſeth that his Executor ſhall preſent to it after his Deceaſe, and giveth Inheritance to another, 'tis good. Pynchin *verſus* Harris, 2 Cro. 371.

Apprentices.

Avoidance, { The next Avoidance in Right of the Wife, doth not paſs.

Bedding.

Bedding.
Bills.
Bonds, — By the Civil Law, the Debt or Sum therein mentioned doth paſs; but thoſe made to the Wife *dum ſola*, do not paſs.
Boxes.
Braſs.
Cabinet.
Carts.
Cattel, — Of all Sorts.
Chattels, — Real and Perſonal which he hath in his own Right, and not in Right of his Wife, or as Executor.
Cheſts.
Ciſterns.
Coperceners and Tenants in Common, — May deviſe their Share, ſo may Tenants in Common; yet if a Leaſe of Lands or Goods is made to Two, *Habendum*, the one Moiety to one, and the other Moiety to the other, each may deviſe his Moiety.
Coppers, — Not faſtned to the Freehold.
Corn, — In the Barn, Field, or Ground, which the Teſtator might have cut if he had lived; and if the Huſband deviſe Corn growing on his Wife's Land, and dies, the Deviſe is good, whether the Corn was ſown before or after Marriage.
Debts.
Deſks.
Fairs.
Ferrets.
Fruits, — Gathered, but not growing on Trees.
Glaſs Windows.

Greybounds,

Greyhounds, Pass not.

Goods, By a Devise of all his Goods, Leases for Years, Pass, *Moor* 352. And by the Civil Law, such Goods which remain after Debts paid, *Godol.* 467.

Guns.

Hay.

Hemp.

Hops.

Hounds.

Houshold stuff, Books, Cattle, Cloaths, Coaches, Corn, Carts, Plows, Waggons, and any Thing fixed to the Freehold, doth not pass by this Word; but Plate used about the House, and not for Ornament, passeth.

Jewels, See the Earl of *Northumberland*'s Case.

Joint-Tenant, Cannot devise his Part.

Iron.

Keys, Pass not by a Devise.

Leases, For Life or Years.

Leets, Profits thereof.

Linnen.

Locks, Pass not.

Markets.

Mastiffs.

Money.

Mortgages.

Moveables, By the Civil Law, Actions, and Rights of Action passed by the Word moveables, when the Words of Universality were reiterated in the Devise, as I give to *R. B.* all my moveable Goods and immoveable of which Kind soever, or wheresoever found.

Moveables

Moveables,

Moveables inanimate are paſſive in their Motion, as Books, Houſholdſtuff, and the like.

Moveables animate are active in their Motion, as Cows, Horſes, *&c.* but all paſs by this Word Moveables; and by Immoveables, Leaſes, Rents, Graſs, Corn growing, *&c.* do paſs.

The Civilians have made a very nice Diſtinction between Money lock'd up in a ſtrong Cheſt, and Money put in a Cheſt for common Uſe; in the firſt Caſe they tell us, it doth not paſs by the Word Moveables, and as Dr. *Godolphin* quibbles upon it, *tho' never ſo current*; but I ſee no Reaſon for this Diſtinction.

Pewter.

Plate.

Ploughs.

Preſentation, To a Church which a Biſhop hath in Right of his Biſhoprick, and void in his Life-time, cannot be deviſed by him, 1 *Inſt.* 185, 308.

Saffron.

Ships.

Spaniels.

Statues.

Tythes.

Trees, Felled.

Utenſils, By this Word Plate and Jewels will not paſs, *Dyer* 59 *B.*

Waggons,

Wainſcot. Doth not paſs.

(3.) *Some*

(3.) *Some Deviſes are void in themſelves, without any Manner of Relation to any ſubſequent Act of the Party.*

As a Deviſe to his eldeſt Son in Fee, this is void, becauſe he takes no more by the Will, than what the Law would have given him without it. Vaugh. 271

So a Deviſe *to his Iſſue*, he having then a Son and Daughter, was held void, becauſe the Word *Iſſue* being in the ſingular Number, it was uncertain which he meant; but Juſtice *Croke* tells us, it ſhall go to the Son as the moſt worthy,* and my Lord *Hales* was of the ſame Opinion; for the Word *Iſſue* being *nomen collectivum*, 'tis a wrong Expoſition to make the Will void for Uncertainty. Tayler *verſus* Sayer, 2 And. 134. Cro. Eliz. 742. contrà. * 1 Vent. 229.

But where the Deviſe was to his Wife for Life, and after her Death, *to the Heirs Males of any of his Sons, or next of Kin*; it doth not appear whether he intended the Heirs Males of his *Son* or of his next of *Kin*; for the Words are in the *Diſjunctive*, and therefore the Court inclined that Will to be void. Beal *verſus* Wyman, Stiles 240.

By a late Statute all Deviſes are made void and fraudulent againſt *Creditors* only, their Heirs, Executors, *&c.* and ſuch Creditor may bring an Action of Debt on his *Bond or Specialty* againſt the Heir at Law of the Obligor, and againſt the Deviſee *jointly*, who ſhall be chargeable for a falſe Plea, in the ſame Manner as the Heir would have been for ſuch Plea, or for not confeſſing the Aſſets deſcended, that is, for the Debt and Damages with any Writ of Enquiry. 4 & 5 W. & M. cap. 14.

Dilapidation.

Dilapidation.

THIS is where the Incumbent either wilfully or negligently ſuffers the Parſonage or Vicaridge-Houſe, Barns, or any other Buildings belonging to the Church to fall down, or be in decay for Want of neceſſary Reparations, and which by Law he is bound to repair.

The *Executors or Adminiſtrators* of the Perſons in whoſe Time the ſame was done or ſuffered, muſt make amends to him who ſucceeds in the Benefice; if they refuſe, they may be ſued in the Spiritual Court, or the Succeſſor may bring an Action againſt them at Common Law, in which Damages ſhall be recovered.

13 Eliz. cap. 10. And by the Statute 13 *Eliz.* if any Eccleſiaſtical Perſon who is bound to repair the Buildings whereof he is ſeiſed in Right of their Place or Function, ſuffer them to fall into decay, and make fraudulent Gifts of his perſonal Eſtate, on Purpoſe to hinder the Succeſſor from recovering Dilapidations againſt his *Executor or Adminiſtrator*, in ſuch Caſe the Succeſſor ſhall have like Remedy in the Spiritual Court againſt the Grantee of ſuch perſonal Eſtate, as he might have had againſt the Executor or Adminiſtrator of the Predeceſſor, and all Money recovered for Dilapidations, muſt, within two Years, be employed upon the Buildings for which it was paid, under the Penalty of forfeiting double to the King, which ſhall not be ſo employed.

14 Eliz. cap. 11.

Biſhop of Saliſbury's Caſe, Godb. 279. A Parſon cannot cut down Trees on his Lands, unleſs for Repair of the Parſonage-Houſe or Buildings; if he doth, he may be puniſhed in the Spiritual Court, or at Common Law.

Biſhop of Durham's Caſe, 2 Bulſt. 279.

Diſtribution. See *Adminiſtration*, *ante* 22.

Durante

Durante Minore ætate, *Administration*, &c. *See Fo.* 73.

WHERE an Infant is made Executor, the Execution of the Will ſhall not be committed to him until he attain the Age of 17 Years; but it ſhall be granted to another *durante Minore ætate* of the Infant Executor, and the Power of ſuch Adminiſtrator ceaſes when the Infant is 17 Years of Age, as aforeſaid; and if 'tis a Female Infant who is made Executrix, and ſhe afterwards marries a Man of 17 Years or upwards, her Huſband ſhall have Execution of the Will in the ſame Manner as ſhe might if ſhe had been of that Age.

And if an Action is brought *againſt ſuch Adminiſtrator*, the Plaintiff need not ſet forth in his Declaration the *Age* of the Infant Executor at the Time of the Action commenced; for tho' he may be then more than † 17 Years of Age, and by Conſequence the Power of ſuch Adminiſtrator is determined; yet ſince the Plaintiff may be a Stranger to it, the Defendant ſhall not take this Advantage, eſpecially if he joined Iſſue, by which he doth admit that his Power continues. Croſt *verſus* Walbrook, Yel. 128. † Carver *verſus* Haſlerig, Hob. 25.

But where ſuch Adminiſtrator is Plaintiff, he muſt ſet forth the Age of the Infant, and *aver* him to be under 17 Years, in order to entitle himſelf to the Action. Hall *verſus* Salvin, 1 Roll. Rep. 400.

*This is warranted by the Authorities in the Margin; but by later Reſolutions there is no Occaſion of ſuch *Averment*, for it ſhall be † intended the Infant was under the 17 Years, unleſs it be ſhewn that he was more, eſpecially where a Defendant * Aldred *verſus* Walthall, 2 Roll. Rep. 186, 209. 2 Cro. 590. Amy

verſus Whiſtler, 2 Roll. Rep. 466. † Wells *verſus* Soames, Cro. Car. 240.

ſendant hath admitted him to bring the Action, and had pleaded to Iſſue.

This Limitation of 17 Years comes in by the Canon Law, which is ſtill obſerved in our Law, where *ſpecial Adminiſtrations* are granted *durante Minore ætate*, (*viz.*) *ad opus & commodum* of the Infant, or to the Uſe of a Legatee; for in ſuch Caſes the Adminiſtration determines when the Infant or the *Ceſtui que Truſt* reſpectively attain to the Age of 17 Years, and ſo it doth where an Infant is made Executor, and another is appointed to be Executor during his Minority by the *Act of the Teſtator himſelf*, as where he declared that none ſhould have any Dealing with his Goods until his Son came of Age, except *R. B.* by theſe Words *R. B.* is made Executor *durante Minore ætate*.

Pemberton *verſus* Lacy, Cro. Eliz. 164.

'Tis otherwiſe where *Adminiſtration* is granted *cum Teſtamento annexa durante Minore ætate, &c. generally*, for ſuch Adminiſtration doth not ceaſe now till the Infant is of full Age, (*viz.* 21.) becauſe by the Statute for ſettling Inteſtate's Eſtates, the Adminiſtrator is to give Bond to the Ordinary truly to adminiſter, *&c.* and an Infant under * 21 Years cannot give ſuch Bond.

*Atkinſon *verſus* Corniſh, 5 Mod. 395.

† And becauſe this *Adminiſtration* is not within that Statute, therefore the Ordinary is not obliged to grant it to the *next of Kin* of the *Infant Executor*, but to whom he ſhall think fit.

† 1 Vent. 219.

Debt againſt an Adminiſtratrix upon a Bond of her Huſband; ſhe pleaded in Abatement that her Huſband made a Will, and her Son Executor, who is an Infant, and that Adminiſtration, with the Will annexed, was granted to her *durante Minore ætate* of the Infant Executor, *unde ex quo, &c.* and upon a ſpecial Demurrer to this Plea, the Plaintiff had Judgment, becauſe the Defendant did not aver her Plea.

Little *verſus* Plant, 1 Lutw. 20

Upon

Upon what hath been already ſaid, it appears there is a Difference where an *Adminiſtration is granted* to another by the Ordinary *durante Minore ætate* of an Infant Executor, and where one is appointed Executor by the *Act of the Party himſelf*, *durante Minore ætate* of ſuch Infant Executor; for, in the firſt Caſe, the Adminiſtration doth not determine until the Infant is of full Age, for the Reaſon before mentioned, and in the other it ceaſes at 17 Years, as for Inſtance:

Sir *William Whitmore* having ſettled great Part of his Lands by Deed, and having a great perſonal Eſtate, deviſed ſeveral Legacies, *&c.* and after thoſe were paid he deviſed the Surplus to the Lord *Craven* for the *Uſe* of his only Son *William Whitmore*, and the Heirs of his Body, and for the *Uſe* of the Heirs of the Bodies of his Three Siſters, in Caſe his Son ſhould die *in his Minority* without Iſſue; and he made his *Son Executor*, and appointed the *Lord* Craven *Executor during the Minority of his Son*, and afterwards died, his Son being then about 13 Years of Age; the Lord *Craven* proved the Will; the Son married, and about the Age of 18 deviſed all his real and *perſonal Eſtate* to *Frances* his Wife, and made her Executrix, and died without Iſſue before he was 21, and without proving his Father's Will; then *Frances* his Widow proved that Will; and it was decreed that ſhe had a good Title to the Surplus of the perſonal Eſtate as Executrix to her Huſband, becauſe the Executorſhip of the Lord *Craven* determined when the Son was 17 Years of Age, and then an Intereſt was veſted in him, and the Deviſe over of the Surplus was of no Effect; for the Word *Minority* (where the Deviſe is over to the Siſters) muſt be underſtood to determine at the ſame Time as the *Minority* determines in that

2 Vent. 367
2 Ch. Rep. 167.

Clauſe of the Executorſhip to the Lord *Craven*, which was at 17 Years of Age.

However, I ſhall mention:

(1.) *Some former Reſolutions relating to the Time of determining an Adminiſtration*, durante Minore ætate.
(2.) *What Acts ſuch an Adminiſtrator may do during the Minority of the Executor.*
(3.) *What Acts he cannot do.*
(4.) *What Acts the Adminiſtrator and Infant Executor may do after he comes of Age.*

(1.) *As to the Time of determining ſuch Adminiſtration*, ſomething hath been already ſaid, to which I ſhall only add, That if any Adminiſtration is granted during the Minority of two Infants, and one of them comes to the Age of 17, the Adminiſtration ſtill continues, but if one was 17 at the Time of the Adminiſtration granted, and the other under that Age, the Adminiſtration is void.

Brownl. 47, 81.

Debt againſt an Adminiſtrator *durante Minore ætate* of *R. B.* the Executor; and avers, That the ſaid *R B.* was within the Age of 21, which he might be, and yet above 17, and becauſe ſuch an Adminiſtration ceaſed at that Age, and if committed afterwards, 'tis void, therefore it was adjudged againſt the Plaintiff.

Pigott *verſus* Gaſcoigne Cro. Eliz. 602. 5 Rep. 29. 1 Brownl. 46

I have my Lord *Coke*'s Reports, which were formerly the Books of Juſtice *Croke*, and under this Caſe he hath wrote, *(viz.)* If *A. B.* had been made *Executor by the Will*, until *R. B.* ſhould be of the Age of 21, and the Executor had refuſed, in ſuch Caſe Adminiſtration ſhould be granted to another, until the ſaid *R. B.* comes to 21; as it was by the Will of *Margery Langton*, who made *Nicholas*

Bromhead *verſus* Rogers, 2 Brownl. 247.

cholas Hobbs Executor, and *John Guy* and *John Doughty* Executors, until *Nicholas Hobbs* ſhould be of the Age of 21; they both refuſed, and Adminiſtration was committed by the Prerogative Court to *Toby Horton*, until the full Age of *Nicholas Hobbs* the true Executor, and concludes *quod nota Bené.*

But moſt of the Reſolutions before the Statute for ſettling Inteſtates Eſtates are, That if it appear in pleading, that the Adminiſtrator was more than 17 Years of Age, that in ſuch Caſe the Adminiſtration is determined. Davenport *verſus* Pinſent, Cro. Car. 516. 1 Roll. Abr. 526, 910.

* And 'tis to be obſerv'd, that if one of full Age and an Infant are made Executors, and Adminiſtration is granted to one during the Minority of the other, in ſuch Caſe they muſt both join in any Action to be brought by them as Plaintiffs, or 'tis wrong, unleſs 'tis ſpecially ſet forth in the Declaration, that there was another Executor under Age, tho' not joined. * Smith *verſus* Smith, Yel. 130. 1 Brownl. 101.

Covenant, *&c.* by an Adminiſtrator *de Bonis non durante minore ætate of Rebecca Wood*, brought againſt Huſband and Wife, Executrix of her firſt Huſband, and *averred* that ſhe was under Age. The Defendants plead in Bar, that after the laſt Continuance the ſaid *Rebecca* came of Age, (*viz.* 21.) The Plaintiff demurred, but it was never argu'd, becauſe he could never maintain the Demurrer, for as ſoon as *Rebecca* came of full Age, there was an End of the Action; ſo where a *Scire facias* was brought by an Adminiſtrator during the Abſence of *W. R.* who was right Executor, upon a Demurer it was held good; but that an Action brought by ſuch an Adminiſtrator ſhall abate, as ſoon as the right Perſon comes, but Actions brought againſt him ſhall not. Major *verſus* Peck, 1 Lutw. 338.

(2.) *The Acts which ſuch an Adminiſtrator may do during the Minority of the Infant, are as follow:*

ff. 'Tis generally held, that this Adminiſtrator hath only a ſpecial Property in the Goods *ad proficuum Executoris*, and not a general Property as another Adminiſtrator hath, and yet he may bring an Action of *Trover* for the Goods of the Teſtator, for he hath not only the Cuſtody but the Property of ſuch Goods.

Seth *verſus* Seth, 1 Roll. Abr. 910.

He may ſell the Goods of the Teſtator and pay Debts, and do moſt other Acts which an Executor might do, ſo as they are for the Benefit of the Infant Executor.

(3.) *But he cannot ſell or diſpoſe any Thing but in Caſes of Neceſſity, as* Bona peritura, *or to pay Debts as aforeſaid; he cannot make a Leaſe but till the Infant comes of Age; neither can he ſell any Leaſe or Term of Years deviſed to the Infant; and all this was reſolv'd in* Prince *and* Simpſon's *Caſe.* †

† Prince *verſus* Sympſon, 2 And. 132 Cro. Eliz. 718. 5 Rep. 29. S. C.

ff. Anno 41 *Eliz.* Leaſes were deviſed to an Infant Executor, and Adminiſtration was granted to another during his Minority; it was adjudged, That ſuch Adminiſtrator could not ſell theſe Leaſes without ſome reaſonable Cauſe, as if there were no other Goods to pay the Teſtator's Debts; but it was held he might ſell fat Cattle, for theſe were *Bona peritura*, and the Reaſon of this Reſolution was, becauſe ſuch an Adminiſtrator hath not an *abſolute Property* in the Goods, but only a *ſpecial Property, in proficuum Executoris.*

Owen 35.

And therefore he cannot bring an Action of *Debt*; this was my Lord *Dyer*'s Opinion, becauſe he is in Nature of a Servant or Bailiff to the Executor.

Miller *verſus* Gore, Golb. 104.

Neither can he be ſued upon a Bond of the Teſtator; for he hath no Intereſt in his Eſtate; this appears by a ſhort Note in *Godbolt*, (*viz.*) Bonds were aſſigned to the Queen, who brought a *Sci. fa.* againſt an Infant Executor, and he pleaded, That Adminiſtration of the Goods of the Teſtator

Teſtator was granted to *R. B.* during his Minority, but the Court of Exchequer, *Anno* 31 *Eliz.* held this to be no good Plea, but ruled him to anſwer as Executor, and this was when *Manwood* was chief Baron there.

(4.) *As to ſuch Actions which an Adminiſtrator or Infant Executor may do when the Executor comes of Age.*

Firſt, Such an Infant when he comes of Age cannot have an *Action of Accompt* againſt an *Adminiſtrator*, *durante Minore ætate*, of or for the Goods of his Teſtator; but he may bring *Detinue* or ſue him in the Spiritual Court. Bendlow's 25.

Then as to Actions brought by ſuch Adminiſtrator, if he recover Judgment, and before Execution the Executor comes to the Age of 17, it was a Queſtion how it ſhould be executed, becauſe the Power of the Adminiſtrator was then determined, and the Executor himſelf could not have Execution, becauſe he was no Party to the Record; but it was held, That he might ſue out a ſpecial *Sci. fa.* upon the Record, and ſo take out Execution in his own Name; all this appears by a ſhort Note in *Brownlow*, where the Year-Book 27 *H.* 8. 7. *a.* is cited to warrant it; but I have look'd into that Book, and there is nothing there like it. 2 Brownl. 83.

So where ſuch an Adminiſtrator had Judgment, and brought a *Sci. fa.* againſt the Bail, who pleaded that *R. B.* the Executor was of Age, upon Demurrer this was held an ill Plea, becauſe the Recognizance entered into by the Bail, was to the Adminiſtrator himſelf by Name, and the Infant's coming of Age doth not hinder him from bringing the *Sci. fa.* Enbrin *verſus* Monpeſſon 1 Lev. 37

The Caſes before mentioned were where the Adminiſtrator was Plaintiff, theſe which follow are where he was Defendant.

Ford *verſus* Granvile, Moor 462.

ff. Debt was brought againſt an Adminiſtrator *durante Minore ætate*, and pending the Action, the Infant Executor came to the Age of 17; it was a Queſtion whether the Action abated, and the Judges were in great Doubt about it, as Serjeant *Moor* tells us; but where ſuch an Adminiſtrator was Plaintiff, and Judgment was obtained againſt the Defendant, and he was in Execution, and afterwards the Infant Executor came of Age, and it was mov'd, That the Priſoner might be diſcharged, becauſe the Authority of the Perſon, at whoſe Suit he was in Execution, was determin'd, and he could neither give the Defendant a Diſcharge, nor acknowledge Satisfaction upon Payment of the Money; but the Court were of Opinion, That the Judgment and Execution were in Force, and that if the Defendant would be reliev'd, he muſt bring an *Auditâ querelâ*; but in 2 *Lev.* 37, my Lord *Hales* was of Opinion, that if Execution had been taken out after the Executor came of Age, it had been wrong.

Moor Goldbolt 104.

Palmer *verſus* Litherland, Latch. 160, 267.

If ſuch an Adminiſtrator waſtes the Goods, he cannot be charged as *Executor de ſon Tort* when the Infant comes of Age, becauſe he had a lawful Authority to poſſeſs himſelf therewith, and in ſuch Caſe he muſt be charged upon the ſpecial Matter; but if the Goods had been in his Poſſeſſion, the Infant might have an Action of Detinue againſt him.

1 And. 34.

Brooking *verſus* Jennings, 1 Mod. 174

So where an Executor is conſtituted *by a Will* during the Minority of an Infant Executor, and ſuch an Executor waſtes the Goods, and then the right Executor comes of Age, he hath a Remedy againſt the other, but he is not liable to the Suits of other Perſons upon that Account.

Notwithſtanding it is held in *Anderſon*, That if the Goods had been in the Poſſeſſion of the Adminiſtrator, an Action of Detinue might be brought

brought againſt him by the Infant Executor when he comes of Age; yet many Years after, this was made a Queſtion.

For *Anno* 13 *Car* 2. it was doubted how he ſhould be charged, he having the Goods then in his Poſſeſſion, it was agreed it would not be as *Executor de ſon Tort* for the Reaſon before mention'd; but there were ſome Opinions, That he might ſtill be charged as Adminiſtrator *durante Minore ætate*, becauſe a Stranger might not know when the true Executor came of Age, but by the Adminiſtrator's ceaſing to intermeddle; however, it was generally agreed, that the ſafeſt Way was to charge him upon the ſpecial Matter. Lawſon verſus Croſts, Sid. 57.

If ſuch an Adminiſtration is repealed, and Adminiſtration is granted to another *durante Minore ætate*, &c. who compels the firſt Adminiſtrator to account, and afterwards gives him a Releaſe, yet the Infant Executor, when he comes of Age, may bring him to account again, for what was done by the other, ſhall be no bar to him. 1 Roll. Abr. 911.

Dying: Legatee dying in the Life of the Teſtator.

See *Appeals*, *fo.* 82.

ESTates both real and perſonal have been often † deviſed to take Effect at a Time to come, and many Queſtions have been made ‖ where the Deviſees have *died* before that Time, whether their Intereſt ſurvives to their Executors, or not; all which I have collected under theſe Heads:

† *See* Feme Executrix. poſtea.

‖ *See* Heir. poſtea.

(1.) *Where the Deviſee dieth in the Life-time of the Teſtator, whether is the Legacy due or not?*

(2.) *Where the Intereſt of a Deviſee of Lands doth determine upon his dying before the Time appointed for him to take.*

(3.) *Where not.*

(4.) *Where the Intereſt of a Legatee of perſonal Things determines upon his dying before the Legacy is due.*

(5.) *Where not.*

(6.) *Of Deviſes to one when of Age, or at ſuch an Age.*

(7.) *Of appointing one to receive the Profits, &c. till another comes of Age, and his dying before that Time.*

(8.) *Legatee dying before probate, &c. to whom muſt Adminiſtration be committed.*

(9.) *Leſſor dying after the half Year, and before the Day of Grace.*

Godol. 453.

(1.) By the Civil Law a Legacy is not due, unleſs the Legatee ſurvive the Teſtator; ſo 'tis if the Legacy is conditional, and he die before the Condition perform'd, or if 'tis payable on an *uncertain Day*, and he die before that Day comes. but if payable on a *certain Day* 'tis otherwiſe, for then it ſhall ſurvive to his Executors, and muſt be paid at the Teſtator's Death.

The firſt Inſtances of this Nature ſhall be concerning Lands.

Brett verſus Rigden, Plow. Com. 345. *Cited in* Shelley's *Caſe*, 1 Rep. 105. *And in the Rector of* Chedington's *Caſe*, 1 Rep. 155.

ſſ. A Deviſe of *Lands* to *Henry Brett* and his *Heirs*, the Deviſee died in the *Life-time of the Teſtator*; by this the Deviſe is countermanded, for the Deviſee was not in being at the Time when the Deviſe ſhould take Effect, and the Word *Heirs* here is not a Name of *Purchaſe*, ſo as to entitle the Heirs of *Henry* to the Land, by deſigning the Perſon who ſhould take, but a *Limitation* of the Eſtate; for if it was a Deſcription or Deſignation of the Perſon, then his Widow would have

have been endowed, and if he had died without Iſſue the Land would eſcheat; but neither of theſe Things would have been allow'd, becauſe the Land did not veſt in the Deviſee, and by Conſequence his Son will not have it.

Note, *In this Caſe there was no* new Publication *of the Will, which there was in the Caſe following:*

ſſ. The Father having four Sons, deviſed his Lands to *R. B.* his youngeſt Son in Tail, with ſeveral Remainders over to his other Sons ſucceſſively in Tail: *R. B.* died in the *Life-time* of the Teſtator, leaving Iſſue a Son, and afterwards the Teſtator ſaid, *my Will is, That the Sons of* R. B. *ſhall have the Land deviſed to their Father, as they ſhould have if their Father had over-lived me.* The Court was divided upon this Caſe, for two Judges were of Opinion, That the *Son of R. B.* ſhall not have the Land, becauſe the *new Publication* was not in Writing, and that he could not take as Heir to *R. B.* becauſe it never veſted in him; which agrees with the Judgment in *Brett's* Caſe; and if he ſhould take by the Will he would take by *Deſcent*, but if by the *new Publication* he would take by *Purchaſe*. The other two Judges held, That the Son of *R. B.* ſhould take by *Purchaſe*, and that the Teſtator knew he could not take by *Deſcent*, becauſe his Father died in the Life-time of the ſaid Teſtator, therefore he intended he ſhould take by *Purchaſe* by this *new Publication*; for 'tis plain, that if the Deviſe had been to *R. B.* and to the Heirs of his Body, and *R. B.* had been dead at that Time, his Heir ſhould take by *Purchaſe*.

Fuller verſus Fuller, Moor 353. Cro. Eliz. 422.

So a Deviſe to *R. B.* in Fee, to the Uſe of *H. B.* and the *Heirs Male* of his Body, and for Default of ſuch Iſſue, to his Daughters: *R. B.* died in the *Life-time* of the Teſtator, leaving Iſſue a *Daughter*, and

Hartopp's *Caſe*, Cro. Eliz. 249. 1 Leon 253

and his Wife *Enſeint* with a *Son*, of which ſhe was afterwards deliver'd; adjudged, That neither the Son or Daughter ſhall have the Land, for it cannot veſt in the Son, becauſe it never veſted in *R. B.* his Father, for he died in the Life-time of the Teſtator, and here the Word Heirs doth not give an immediate Eſtate, but 'tis a Word of Limitation.

Aſſumpſit againſt two Executors after Iſſue joined, one of them died, and the Plaintiff ſuggeſting this Matter on the Roll, proceeded againſt the Survivor; and had a Verdict; it was inſiſted in Arreſt of Judgment, that *by the Death of one* the Writ abated againſt the other. 'Tis true, in all Actions of Treſpaſs founded on a Wrong, *by the Death of one Defendant* the Writ abates againſt the Survivor, but 'tis not ſo where the Action is founded on a *Contract*, as an *indebitatus aſſumpſit*, *nil Debet*, *&c.* and ſo is *Woodward* and *Darcie's* Caſe in *Plowd.* 186. upon the Authority of which Caſe this Judgment was arreſted.

Worrell *verſus* Brand, Raim. 131

Scire facias againſt an Executor, to ſhew Cauſe why the Plaintiff ſhould not have Execution on a Judgment obtain'd againſt the Teſtator. The Defendant demanded Oyer of the Record, by which it appeared, that the now Plaintiff had brought an *Aſſumpſit* againſt the Teſtator, and upon *non aſſumpſit* pleaded, they were at iſſue, and a Trial was had at the *niſi prius*, and that between the *Tryal and the Day in Bank*, *the Teſtator* died, and thereupon the Defendant now pleaded, that the Teſtator owed him ſo much Money on Bond, which he retain'd, *&c.* and had not Aſſets *ultra*, and upon a Demurrer to this Plea, it was adjudg'd, That by the Statute 17 *Car.* 2. *Cap.* 8. the Death of the Teſtator was ſupplied, ſo as to make the Judgment obtain'd againſt him good, and to overreach the Debt due to the Executor.

Burnett *verſus* Holden, Raim. 210 1 Lev. 277. S. C. 1 Mod. 6. S. C. 1 Sid. 424. S. C.

Since

Since the Caſe laſt mention'd, the *Statute* 8 & 9 Will. *cap.* 11. *enacts, That if the Plaintiff or Defendant die after an Interlocutory, and before final Judgment, the Action ſhall not abate, if ſuch Action might be originally proſecuted againſt Executors or Adminiſtrators; and the Executors and Adminiſtrators of ſuch Plaintiff, after an interlocutory Judgment, may have a* Sci' fa' *againſt the Defendant if living, or if he be dead, againſt his Executors or Adminiſtrators, to ſhew Cauſe why Damages ſhould not be aſſeſſed and recovered againſt him; and if they do not appear at the Retorn of the Writ and ſhew Cauſe,* &c. *or being retorned, warned, or Nihil retorned, upon two Writs of* Sci' fa' *a Writ of Enquiry of Damages ſhall be awarded, which being executed, Judgment final ſhall be given.*

The Teſtator deviſed his Lands to his two younger Sons and their Heirs; one of them died in the *Life-time* of their Father, and there was no other Publication of the Will; adjudged, That the Survivor ſhall have the whole. This had been no Queſtion, if the Son had ſurvived the Father, and then died, for in ſuch Caſe they had been Jointenants, the Law would have transferr'd the whole to the other by Survivorſhip. Davis *verſus* Kemp, Carter 22

The Law is the ſame if any perſonal Thing is deviſed to a Man who dies in the Life-time of the Teſtator, the Executor of ſuch Legatee ſhall not have it.

(2.) *As to a Deviſe of* Lands, *in ſome Caſes the Intereſt of the Deviſee determines upon his* Death, as where a Man deviſed his Lands to his Son *when he ſhall come to the Age of* 24, and that his Executor *ſhall have the Overſight and dealing thereof in the mean time*, the Son died before that Age; adjudged, That the Intereſt of the Executor was determined by the Death of the Son; for the Teſtator did not intend to bar the next and right Heir of his Carpenter *verſus* Collins, Yel. 73. Moor 774. 1 Brownl. 88.

his Son, until he would have been of that Age if he had lived. But if it had been to be paid at his full Age, and he die before, then the Executors may recover in the Spiritual Court.

Godb. 181.

(3.) *But in many Caſes the Intereſt is not determined by the Death of the Party before the Time limited in the Will.*

Moor 48.

As to a Deviſe to his Wife *from Year to Year until* his Son ſhould come to the Age of 20 Years, if the Son die before that Time, tis true the Intereſt of the Wife is determined, becauſe the Words *from Year to Year* ſhew, that it was the Intention of the Teſtator, that the Eſtate ſhould end upon the Death of his Son; but if theſe Words had been omitted, and the Deviſe had been to the Wife *until* the Son ſhould come to that Age there, tho' he had died before, yet the Eſtate of the Wife ſhould continue.

Boraſton's Caſe, 3 Rep. 19.

And this agrees with *Boraſton's* Caſe, which was a Deviſe of his Lands for eight Years, and afterwards, that it ſhould remain to his Executors *until* Hugh *ſhall be of the full Age of* 21 *Years*, and this to perform his Will; and *when Hugh ſhall* be of that Age, *then* to him and his Heirs: He died at 9 *Years*; adjudged, That the Executors ſhall have it 'till *Hugh* ſhould have been of that Age if he had lived; 'tis true, *when and then* are Adverbs of Time, but when they refer to a Thing which muſt of Neceſſity happen, they make no Contingency. Now, if the Word *ſhall* in this Caſe ſhall be taken for *ſhould*, then they refer to a Thing which muſt neceſſarily happen; for 'tis certain (as my Lord *Coke* tells us) that *Hugh* either *ſhall or might* have accompliſhed the Age of 21; but with Deference to his Opinion, I can ſee no Certainty in it, for it will not be affirmed that 'tis certain any one *ſhall* live to 21, neither is there any Certainty in ſaying, a Man *might or ſhould*

ſhould have accompliſh'd that Age, for thoſe are Words which reſt in Contingency, *viz.* he *might or ſhould* have accompliſh'd that Age, if he did not die before; 'tis true, if the Executors were to have it 'till *Hugh ſhould be* 21, then the Term may be made certain, by computing it from his Death, until he ſhould have been of that Age if he had liv'd; however, we have his Word for it, that *ſhall* and *ſhould* in Conſtruction of Law are all one, and *then* and *when* are Demonſtrations of the Time, *when* the Remainder to *Hugh* ſhall take Effect in *Poſſeſſion*, and not when it ſhall *veſt*.

There is another Diſtinction made in *Boraſton*'s Caſe, between a *Leaſe* and a *Will*, as to this Matter, *viz.* If the Teſtator had made a *Leaſe* until *Hugh* ſhould have attained his full Age, (he being then about 9 Years old) he would not have an abſolute Term for 12 Years; for if *Hugh* died before 21, the Intereſt of the Leſſee would have determined; but in a Deviſe 'tis otherwiſe; for where the Teſtator deviſed the Lands to his Executors, until *Hugh ſhall accompliſh his full Age of* 21 *Years*, (he being then but 9 Years old) it was adjudged, that the Executors had an abſolute Term for 12 Years, which did not determine upon the Death of *Hugh* within that Time, becauſe the Deviſe being to his Executors (until that Time) *for the Performance of his Will*; it ſhall be intended, That the Teſtator had computed the Time in which his Debts might be paid by the Perception of the Profits, *viz.* in 12 Years, and therefore he deviſed his Lands to his Executors until *Hugh* (who was then 9 Years old) ſhould be of full Age; and this ſhews that he did not intend the Intereſt of the Executors ſhould determine on his Death, ſo that it was a preſent Deviſe to them, and not contingent.

So

Taylor verſus Biddall, 2 Mod. 189

So where the Teſtator deviſed his Lands to his Siſter and *Heir* for ſo long Time, until her Son *Benjamin* ſhould attain his full Age of 21 Years; and after he ſhall have attained that Age, then to him and his Heirs; and *if he die before* 21 *Years*, then to the Heirs of the Body of *Robert*; and made his ſaid *Siſter Executrix*; afterwards, *Benjamin* died before 21; adjudged, that the Siſter had an Eſtate for Years until *Benjamin ſhould or might* be of Age, becauſe ſhe was made Executrix; and that *Benjamin* had a Fee immediately veſted in him by the Deviſe, upon whoſe Death it deſcended alſo immediately upon his Heir.

Sweet verſus Beale, Lane 56.

So where the Teſtator deviſed a Term to his Wife, until his Iſſue of her Body accompliſh the Age of 18 Years, bringing up the ſaid Child; provided, if the Teſtator die without Iſſue, that the Land ſhall be to his Wife for Life: He had Iſſue at the Time of his Death, but that Iſſue died afterwards, before the Age of 18; adjudged, that by this Limitation the Wife ſhall have the Land, *until* the Iſſue *ſhould* have come to the Age of 18, if he had liv'd; becauſe the Time may be made certain, by computing it from his Death, till he *ſhould* be 18 if he had liv'd.

(4.) *The Intereſt of a Legatee ſometimes determines upon his Death, if he die before the Time mentioned in the Will.*

Winch 51. Spencer's *Caſe.*

The Teſtator being ſeiſed of Lands in Fee, ſowed them with Corn, and afterwards deviſed the Lands to *W. R.* adjudged, that the Deviſee ſhall have the Corn, and not the Executors of the Teſtator.

18 Eliz. Allen's *Caſe.*

So where a Man ſowed Land, and afterwards deviſed the Land for Life, Remainder in Fee, and dy'd, and the Tenant for Life alſo dy'd before the Corn was reaped; adjudged, that the Executor of the Tenant for Life ſhall not have it, but he in Remainder.

The

The Teſtator deviſed Land, and afterwards ſowed it, and then died; adjudged, that the Deviſee ſhall have it, and not the Executor of the Teſtator. *Per Winch.*

ſſ. The Lord *Pawlet charged his Lands by Deed,* for the Payment of 4000 *l.* to his two Daughters, *at their reſpective Ages of* 21, *or Marriage*, and reſerved a Power of ordering it otherwiſe by his *Will*; ſoon afterwards he by *Will* deviſed 4000 *l.* a-piece to his two Daughters, for their Portions, in ſuch Manner as he had provided by the *Deed*: One of the Daughters died before 21 or Marriage, * the Mother adminiſtred, and preferred a Bill in Equity againſt the Truſtees and Heir at Law, to have this 4000 *l.* The Queſtion was, Whether ſhe ſhould have it, or it ſhould accrue to the Benefit of the Heir? And decreed it ſhould be for his Benefit, becauſe it was *charged upon the Land by Deed*, and not a meer *Legacy* given by the *Will*; for the *Will* was only declarative of the *Deed*; it was a Truſt charged on the Land, and did not lie in Demand by a Suit, as a Legacy doth, but only by a Bill in *Chancery*, to have the Truſt perform'd.

Lord Pawlett's Caſe, 2 Vent. 366

* Bond's *Caſe*, 2 Ch. Rep. 165. S. P.

But where there was a Deviſe of a Sum of Money, Remainder over, and the firſt Legatee died before he had receiv'd his Legacy; the Lord Commiſſioner *Rawliſon* was of Opinion that it ſhould go to his Executor; but Commiſſioner *Hutchins contra*, that it ſhould go to the Adminiſtrator *de Bonis non*, *&c.*

Mich. 3 Willi. & Mariæ, &c.

(5.) *In many Caſes the Intereſt is veſted immediately by the Will, and the Legatee may diſpoſe of it; or if he die before the Time, and make no Diſpoſition, it ſhall go to his Executor.*

As where the Teſtator was poſſeſſed of a Term for Years, and deviſed his whole Term to *R. B.* upon Condition, that if he ſhould happen to die before *R. N.* that then the Term and the Intereſt thereof

Dyer 74.

thereof ſhould remain to the ſaid *R. N.* during the Reſidue thereof: The Deviſee ſold the Term and died before *R. N.* Adjudged, that he had no Remedy, for it was an Intereſt veſted in *R. B.* by the Deviſe.

Latimer's Caſe, Dyer 59. *B.* So where the Teſtator deviſed 500*l.* to his Daughter, *for and towards her Marriage*, and died, then the Daughter made her Executors and *died before Marriage*; adjudged, that they ſhall have the Money: But if it had been for and towards her Marriage, *to be paid at the Day of Marriage, or at the Age of* 21 *Years*, and ſhe had died before, in ſuch Caſe her Executors ſhould not have it, becauſe the Teſtator did not intend a preſent, but future Intereſt, for Advancement of his Daughter, and that it ſhould remain in Contingency.

Roberts *verſus* Roberts, 2 Bulſt. 123. In like Manner it was where the Teſtator deviſed Portions to his Daughters; and having a Term for Years, bequeathed that to his Son *when he came to the Age of* 21 *Years*, and before he came to 21, *I make it to my Executors, &c.* The Son died before 21; adjudged, that his Adminiſtrator ſhall have the Term, for it was an Intereſt veſted in the Inteſtate.

14 H. 8. 24 H. 8. So where the Teſtator deviſed 20*l.* *to be paid* in four Years, and the Deviſee died the firſt Year, his Executors ſhall have the Money, for 'tis *debitum in preſenti.*

Lady Lodge, 1 Leon. 278. Like the Lady *Lodge*'s Caſe, *viz.* a Legacy was bequeathed to an Infant, *to be paid when he ſhall come of Age*, he died before; adjudged, That his Executor or Adminiſtrator ſhall have it preſently, and not expect until the Infant ſhould have attained that Age, if he had lived.

2 Roll. Rep. 134. *Anno* 17 *Jac.* there was the like Judgment, *viz.* a Legacy was given to a Feme Covert *to be paid* 18 *Months after the Death of the Teſtator*, ſhe died within that Time; adjudged, That her Huſband ſhould

ſhould have it, becauſe ſhe had an Intereſt in it before the Day of Payment, and ſuch an Intereſt which her Huſband might have releaſed.

And with this the modern Authorities agree.

(6.) If. *A Deviſe of a Sum of Money to be paid at the Age of* 21, *or Day of Marriage*, and the Legatee died before; in ſuch Caſe his Adminiſtrator ſhall have it, becauſe the Legatee had a *preſent Intereſt*, tho' the Time of Payment was future: Beſides, 'tis a Charge on the Perſonal Eſtate, which is in Being at the Teſtator's Death; and if the Legacy ſhould be diſcharged by this Accident, it would be for the Benefit of the Executor, which the Teſtator never intended. 2 Vent. 366 *See* Smartle *verſus* Scholler, T. Jones 98. S. P. 2 Lev. 207. S. P.

But if the Deviſe of the Money had been *at her Age of* 21, *or Day of Marriage*, without ſaying when *to be paid*, and ſhe had died before, in ſuch Caſe it is a lapſed Legacy; ſo it is if the Deviſe had been to her *when* ſhe comes to 21, and ſhe die before. Cloberrie's *Caſe*, 2 Vent. 342. 2 Ch. Rep. 155.

As for Inſtance, a Deviſe of 100 *l.* to his Daughter *when ſhe ſhall marry*, or to his Son *when he ſhall be of Age*, and they die before; in ſuch Caſes their Executors ſhall not have it; otherwiſe, if the Deviſe had been to them, *&c. to be paid* at the Day of Marriage, or at the Age of 21, and they die before, their Executors ſhall have it. Godb. 183.

But 'tis otherwiſe where a Legacy is deviſed to one *when he ſhall be of ſuch an* Age, and to another upon the Contingency of his *dying before that Time.*

As *Anno* 4 *Edw.* 6. the Teſtator bequeathed his Goods to his Son *when he ſhould be of the Age of* 21, and *if he die before*, that his Daughter ſhould have them: The Son died under Age; adjudged, that the Daughter ſhould have the Goods immediately, and not ſtay till the Time her Brother would have been of Age if he had liv'd. 1 And. 33.

2 Vent. 347. So a Deviſe of 100*l.* to *R. B. at the Age of* 21, and if he die before, then *W. N.* and *R. N.* to have it, or elſe the Survivor of them; they both died in the Life-time of *R. B.* and before he was of Age, and then *R. B.* likewiſe died under Age; adjudged, that the Adminiſtrator of *R. N.* who ſurvived *W. N.* ſhall have the Money, tho' his Inteſtate *R. N.* died before the Contingency happened.

Roll. Abr. *tit.* Exor. N° X. If a Legacy is deviſed to *R. B.* and *his Aſſigns*, and the Deviſee dies before Payment, his Adminiſtrator ſhall have it, becauſe the Duty remains, it not being limited to the Perſon of the Legatee alone.

(7.) *The Caſes following are where one is appointed to receive the Profits, &c. by a Will, 'till another comes of Age, and he dies before that Time; what Intereſt hath the Perſon by ſuch Appointment.*

2 Leon. 221. *ſſ.* A Deviſe of his Lands to his Son, but that *his Wife ſhould* take *the Profits till he came of Age*; ſhe married again, and died before the Son was of Age; the Huſband ſhall not have the Profits till that Time, becauſe the Wife had only a Confidence, or an *Authority* to receive the Profits, which cannot be transferred to the Huſband by the Marriage, but is determined by her Death: It's true, it had been otherwiſe if he had *deviſed the Profits* of the Lands to her, for that is a Deviſe of the *Land* itſelf.

Carter *verſus* Church, 1 Ch. Rep. 113. But a Deviſe to his Daughter and her Heirs (who was then a Year old) and declared, that *his Executor ſhould receive the Profits* until ſhe ſhould come to the Age of 21, *towards Payment of his Debts and Legacies*, and ſhe dy'd at five Years old; decreed, that this *charging the Profits to be received by his Executor* 'till his Daughter came of Age, amounted to a Leaſe *'till ſhe ſhould attain that Age* if ſhe had liv'd, and ſo like *Boraſton's* Caſe; but

it

it differs from the Caſe laſt mention'd in *Leonard*, becauſe here the Teſtator declared, that the Executor ſhould receive the Profits *for Payment of his Debts and Legacies*, but in the other it was *to take the Profits generally.*

(8.) *Where there is a Deviſe of all his Goods to R. B.* who died before he proved the Will; in this Caſe Adminiſtration of the Goods of the ſaid Teſtator ſhall be granted to the next of Kin of *R. B.* and not to his next of Kin, becauſe *R. B.* was the univerſal Succeſſor. Iſted *verſus* Stanley, Dyer 371.

So where a *reſiduary Legatee* dies before probate, his Executor ſhall have the Adminiſtration, and not the next of Kin of the firſt Teſtator. 1 Shore 26.

Likewiſe where a Man dies Inteſtate, and leaves ſeveral of Kin in equal Degree, and one of them dies before any Diſtribution made; his Part ſhall go to his Adminiſtrator, becauſe by the Statute an Intereſt was veſted in him that was dead. Brown *verſus* Shore, 1 Shore 25.

(9.) Laſtly, *As to the Leſſor's dying after the half Year, and before the Day of Grace*; Clunn's *Caſe is a plain Authority that the Heir ſhall have the Rent.*

If. Rent is reſerved payable at *Michaelmas, or within a Month afterwards*; if the Leſſor dieth after *Michaelmas*, and before the End of the Month, the Heir ſhall have the Rent as incident to the Reverſion, and not the Executor as Rent Arrear, becauſe it was not due until the End of the Month. Clunn's *Caſe*, 10 Rep. 129.

I had omitted this Caſe, *viz.* the Teſtator deviſed his Lands to *R. B.* and his Heirs, *after the Death of W. N.* or after 20 Years; the Land ſhall deſcend to the Heir in the mean Time, becauſe the Teſtator left it to the Law, without making any Diſpoſition of it whilſt *W. N.* lived, or the Term continued. Reding *verſus* Stoner, 1 Roll. Abr. 844.

Error.

27 Eliz. cap. 8.

BY the Statute 27 *Eliz.* 'tis enacted, That where a Judgment is given in the *Queen's Bench*, the *Plaintiff or Defendant* may bring a Writ of Error in the *Exchequer-Chamber*, *&c.* and there the Juſtices of the Common Pleas and Barons of the Exchequer have Power to reverſe or affirm the Judgment.

Scroggs *verſus Lord* Mordant, Cro. Eliz. 294.

About eight Years after the making this Statute it was a Queſtion, Whether an *Adminiſtrator* could bring a Writ of Error upon a Judgment had againſt his Inteſtate in the *Queen's-Bench*, becauſe this Writ of Error in the *Exchequer-Chamber* from a Judgment obtained there, was given by this Statute either to the *Plaintiff or Defendant himſelf* in the Action, *&c.* it doth not ſo much as mention an *Heir*, *Executor*, or *Adminiſtrator*; and before this Statute, erroneous Judgments in the *Queen's Bench* were examinable only in Parliament; but it was adjudged, that tho' an *Adminiſtrator* was not named in the Act, yet he was within the Intent and Meaning of that Law, which was made to prevent the Delays of Juſtice to the Subjects, who were aggrieved by ſuch erroneous Judgments, and which could not otherwiſe be reformed at that Time, becauſe the Parliament did not meet as often as formerly, and when they did meet, they were taken up about greater Affairs.

Eſcape.

See Actions by Executors, 53.

IT hath been a controverted Queſtion, Whether an *Action of Debt* will lie againſt the *Executor of a Goaler*, for ſuffering a Priſoner in Execution to eſcape.

ſſ. Anno 15 *Eliz.* It was held, that ſuch an Action would not lie, unleſs there had been Judgment againſt the *Goaler in his Life-Time*; for the Offence was only a Treſpaſs or Negligence, which *moritur cum Perſona*, 'tis a Wrong which ariſes *ex Maleficio*, and not *ex Contractu*; and that is the Reaſon it dieth with the Perſon. Dyer 322. 271. a. ante 54.

About 15 Years afterwards, Juſtice *Perjam* was of the ſame Opinion; but *Anderſon*, *Windham*, and *Manwood*, unanimouſly agreed, that the Action would lie againſt the *Executor* of the Goaler; the Reaſon of their Judgment is not mention'd in the Book, but probably it was, becauſe the ſuffering one in Execution to eſcape, was not meerly a Perſonal Wrong, but it was mixed with an Intereſt; for the Creditor hath an Intereſt in the Body of his Debtor in Execution; which ought to remain there as a Pledge for his Debt. Goldſ. 90.

But an Adminiſtration may have an Action of Debt againſt the *Sheriff himſelf*, for ſuffering a Priſoner in Execution to eſcape in the Life-time of the Inteſtate; 'tis true, it has been a Queſtion whether an Executor might have *an Action on the Caſe* againſt the Sheriff, for the Eſcape of a Priſoner upon *Meſne-Proceſs* in the Life-time of the Teſtator. 'Tis ſaid in Juſtice * *Morton*'s Caſe, that the Action would lie, but it was not the Point then in Queſtion. Boomer *verſus* Paite, Stiles 32. * 1 Vent. 31. S. P.

It was ſtrongly debated † *Anno* 3 *Car.* when an Action on the Caſe was brought by an Executor againſt an Officer of an inferior Liberty, who ſuffer'd a Priſoner on *Meſne-Proceſs* to eſcape in the Life-time of the Teſtator; and upon Demurrer to the Declaration, *Whitlock* and *Doderidge*, Juſtices, were of Opinion that the Action did lie, if not at Common-Law, yet by the Equity of the Statute, 4 *Edw.* 3. *de* ‖ *Bonis Aſportatis in vitâ Teſtatoris*, which Statute ought to have a favourable †LeMaſon *verſus* Dixon, *or* Maſon *verſus* Dixon, Poph. 189. W. Jones 173. Latch. 167 ‖ 4 Edw. 3. cap. 19.

Construction, in order to the Advancement of Justice; for 'tis reasonable, that since the Testator himself was prevented by this Escape to bring his Action, his Executor should not be deprived in like Manner.

But *Hide* and *Jones* were of a contrary Opinion, That the Action did not lie either at Common-Law, or by the Equity of the Statute; for an Executor could not have any Action at Common-Law, but such which was grounded on a *Contract*, as *Debt*, *Covenant*, or the like, and not those which arised *ex maleficio*, as *Trespass*, *Vi & Armis*, *Battery*, and such Actions; neither was an Executor entitled by the Common-Law to all Actions which were grounded *on Contracts*; for he could have no Action of Accompt before the Statute of *W.* 2. and even at this Time such an Action cannot be brought against him, because it consists in Privity between the Parties themselves, of which the Law presumes he cannot have any Knowledge, being a Stranger.

Neither can the Executor have an Action on the Case upon the Equity of the Statute 4 *Edw.* 3. for that only gives him an Action of Trespass (which he could not have before) for *Goods and Chattels* of his Testator carry'd away in his Life-time. It provides a Remedy for no other Trespasses, as *Assault*, *Battery*, *Slander*, *False Imprisonment*, *& similia*. Now in this Case, the Trespass did not concern the *Goods and Chattels*, there was no manner of Injury done to them, but the Trespass was by suffering the Party to escape; 'tis true, this Statute doth not bind the Executor to *Actions of Trespass alone*, tho' those are the only Actions which are therein mention'd; but it shall be extended by Equity to any other Actions which concern the *Goods*, *&c.* therefore it hath been adjudged, that he may bring *Trover* for Goods taken

ken and converted in the Life-time of his Teſtator, or any other Action where the *Goods and Chattels* are concern'd.

But that an Action of Debt will lie againſt the Marſhal by an Executor, who recovered Judgment for a Debt due to his Teſtator, and had the Defendant in Execution, and the Marſhal ſuffer'd him to eſcape * *in the Time of the Executor himſelf*, this was never doubted: The Queſtion was, Whether it was good in the *Debet & Detinet*? And it was reſolved, that it ought to be in the *Detinet* only; for tho' the Judgment was obtained by the Executor *in his own Time*, yet it was not for a Debt due to himſelf as Executor, but for a Debt due to the Teſtator, and therefore the Action muſt be in the † *Detinet*; and 'tis not helped by the late Statute of *Jeofailes*.

Reynell *verſus* Langcaſtle, 2 Cro. 545, Hob. 264.
*2 Cro. 394
3 Bulſt. 112
Ante 194.
† Brookes *verſus* Cook, 1 Shore 57. S. P.

Anno 13 *Jac.* The like ‖ Action was brought by an *Executor*, for an Eſcape upon an Execution ſuffered *in his own Time*, the Priſoner being in Execution. There was no Objection to the Action it ſelf, for the Plaintiff recovered againſt the Sheriff; but 'tis true, the Judgment was reverſed, becauſe as *Executor* he had declared againſt him, when as Adminiſtrator, he had recovered the Judgment againſt the Perſon who made his Eſcape.

‖ Slingſby *verſus* Lambert, 2 Cro. 394. 3 Bulſt. 112.

Executor Plaintiff.

HAving already mentioned moſt of the Caſes of this Nature under the Title of *Actions*, I ſhall only add in this Place,

See Actions by Executors 31.

(1.) *In what Manner ſuch Plaintiff ought to declare, &c.*

(2.) *I ſhall mention ſome Objection to the Forms of Declarations, and the Pleas to them.*

Bickerstaff *versus* Purdue, 1 Sid. 218.

(1) *If he declare for Rent incurred after the Death of the Teſtator*, he ought not to ſet forth *quod cum* (the Teſtator) *dimiſiſſet, &c. reverſione inde* to him as Executor, for this would have been naught upon a Demurrer. The true Form is *quod cum* (the Teſtator) *poſſeſſionat fuit* of a Term for Years, *&c.* and being ſo poſſeſſed, did demiſe the ſame, *&c.* for if he declare as before, it doth not appear but that the *Reverſion might be in Fee*, and ſo the Rent doth not belong to the *Executor*, but to the *Heir*; but this is cured by a Verdict; for upon *Nil Debet* pleaded, it ſhall be intended, that if it had appeared to be a *Reverſion in Fee*, the Jury would have found for the Defendant.

Emmerſon *verſus* Emmerſon, 1 Vent. 187.

Treſpaſs brought by an Executor, upon the Statute 4 *Edw.* 3. *De Bonis aſportatis in Vita Teſtatoris*, for that the Defendant *Blada Creſcentia*, upon the Freehold of the Teſtator *meſſuit defalcavit, cepit, & aſportavit*, upon not guilty pleaded, the Plaintiff had a Verdict; it was inſiſted for the Defendant, that an Action would not lie *for cutting Corn*, becauſe while it was ſtanding, it was Parcel of the Freehold; but adjudg'd, this was an entire Treſpaſs, and the Declaration deſcribes the carrying away the Corn; 'tis true, if it had been *quare clauſum fregit, & blada aſportavit*, it had been ill; ſo likewiſe, if the *Graſs* of the Teſtator had been cut and carry'd away *at the ſame Time*; becauſe the Graſs is Parcel of the Freehold, but Corn growing is a Chattel.

Carter *verſus* Croſts, Godb. 33.

If the Inteſtate had the Goods in his Poſſeſſion at the Time of his Death, tho' they never came to the Hands of his Adminiſtrator, yet he may declare upon his own *Poſſeſſion*, for 'tis caſt upon him by the Law.

* Rivers *verſus* Godſkirt, Cro. Eliz. 568.

And therefore in *Trover*, where the * Plaintiff as Executor, declar'd, that he was poſſeſſed of 40 *l.* in a Purſe *ut de Bonis ſuis Propriis*, which he loſt, and

and the Defendant found and converted them, *&c. in retardationem Executionis Teſtamenti.* It was objected, that it was contradictory to ſay, that the Plaintiff as Executor was poſſeſſed, *&c. of his proper Goods*, and loſt them *in retardationem Executionis Teſtamenti*: But it was held good, becauſe the Executor was poſſeſſed of the Teſtator's Goods, *ut de Bonis ſuis Propriis*, 'tis a *Poſſeſſion* caſt upon him by Law, and ſo he may declare, and the Converſion is *in retardationem Executionis Teſtamenti*, or at the moſt is but Surpluſage.

And therefore, if he bring Treſpaſs for taking the Goods which were the Teſtator's *tempore Mortis ſuæ*, he need not alledge that they were taken *extra Cuſtodiam ſuam*, for it ſhall be ſo intended; and this was adjudg'd on a Demurrer to the Declaration. Adams *verſus* Cheverel, 2 Cro. 113.

He hath ſuch a Property in the Goods veſted in him, immediately upon the Death of the Teſtator, that if * Adminiſtration ſhould be granted to another, and by Vertue thereof the Adminiſtrator gets the Poſſeſſion of the Goods; yet, as ſoon as the Executor proves the Will, he may recover them by an Action of Treſpaſs, *&c.* againſt ſuch Adminiſtrator. * Fiſher *verſus* Young, 2 Bulſt. 268.

(2.) *As to the pleading the Statute of Limitations to ſuch Action, there was a remarkable Caſe, which is thus:*

Aſſ. Aſſumpſit was brought by an Executrix for Money due to her Huſband the Teſtator; the Defendant pleaded the Statute of Limitations, the Plaintiff reply'd, that her Teſtator filed an Original *in pl'ito tranſgreſſionis ſuper Caſum*, ſetting forth the whole Declaration in the Replication, and that *pendente Placito* her ſaid Huſband dy'd. And upon Demurrer the Queſtion was, Whether this Action brought by the Teſtator *by Original*, was within the Equity of the Fourth Paragraph of the Statute, *viz. If the Action ſhall be brought by* Gargrave *verſus* Every, 1 Lut. 261.

Original

Original, (as this was) *and the Defendant Outlaw'd, and afterwards ſhall reverſe it, in ſuch Caſe the Plaintiff*, his Heirs, or Executors, *may bring a new Action within a Year, but not afterwards.*

Now this being an Action brought *by Original*, and the Plaintiff dying *before the Defendant could be outlaw'd*, the Queſtion was, Whether the Executrix could bring a new Action within a Year, and it was held ſhe could not; but that it was a hard Caſe, for which the Statute had not provided any Remedy.

Hornegold *verſus* Brian, 3 Bulſt. 72.

In Debt by an Executor, the Defendant by Way of Plea appeals from the Will; adjudged, that notwithſtanding the Appeal, the Plaintiff is compleat Executor by the Probate, and that this is an ill Plea, for the Defendant might traverſe the Probate, if the Plaintiff did not produce it in Court, or he may demand *Oyer* of the Will.

Executor Defendant.

See Actions againſt Executors, &c. ante 44.

Swan *verſus* Scarles, Moor 74.

THE Teſtator being only Tenant for Life, remainder to one *Scarles* in Fee, made a Leaſe for 15 Years to the Plaintiff *Swan*, and afterwards made *Scarles* and another Executors, and dy'd: *Scarles* enter'd, and voided this Leaſe, as lawfully he might; whereupon *Swan* the Leſſee brought an Action of Covenant againſt him and the other Executor, and adjudged that it would not lie.

Carter *verſus* Poſſet. Palm 329.

Aſſumpſit againſt an Executor, wherein the Plaintiff declared, that the Teſtator, in Conſideration of 3 *l.* paid to him by the Plaintiff, *promiſed to deliver up ſuch a Bond*, by which he was bound to the Teſtator in the like Sum, and averred that he had paid the 3 *l.* and that the Bond was not deliver'd up: After a Verdict for the Plaintiff,

Plaintiff, it was mov'd in arreſt of Judgment, that an *Aſſumpſit* would not lie againſt an Executor, upon a collateral Promiſe of his Teſtator; but adjudged that it would upon a Contract of the Teſtator; and the Reaſon is the ſame upon a Promiſe, where he had receiv'd a valuable Conſideration; which Judgment was affirm'd in the *Exchequer Chamber*.

A Widow Executrix brought an *Indebitatus Aſſumpſit* againſt an Executor, upon a Promiſe of his Teſtator: She had a Verdict and Judgment in *B. R.* which was reverſed in the Exchequer Chamber: Afterwards the Widow exhibited her Bill in Equity, ſuggeſting all this Matter, and pray'd to be reliev'd; and upon a Demurrer to the Bill, it was over-rul'd; for the Lord Keeper made no Difference where the Plaintiff ſeeks Relief, either after or before Judgment at Law, and ſaid, that by the Advice of all the Judges, he had allow'd Bills for Debts, without Specialty brought againſt Executors, with an Averment that they had Aſſets. Maſters *verſus* Burde. Moor 556.

An Adminiſtratrix brought an Action againſt an Executrix, upon a Bond executed by her Teſtator, for the Payment of 200 *l.* to the Inteſtate; the Defendant pleaded in Bar that the Perſon whom the Plaintiff had alledg'd to be the Teſtator, dy'd inteſtate, and that Adminiſtration was granted to her, this Defendant, and that ſhe ought to be named Adminiſtratrix, and not Executrix; and upon Demurrer, this was adjudg'd an ill Plea, becauſe ſhe did not traverſe that ſhe had adminiſter'd any of the Goods of the Inteſtate, before Adminiſtration was committed to her. Grey *ver. ſus* Thorogood. 1 Lutw. 889.

Debt againſt two Executors upon a Bond of 100 *l.* by the Teſtator; the Defendants pleaded that their Teſtator had acknowledg'd a Recogniſance in the Nature of a Statute Staple, for 1200 *l.* to *W. R.* and that they had not Aſſets *ultra*; the Plaintiff Rogers *verſus* Danvers, 1 Mod. 163

Plaintiff reply'd, that one of the Executors was bound with the Teſtator in the Recogniſance; and upon a Demurrer to this Replication, the Defendant had Judgment, becauſe the Recogniſance being joint and ſeveral, the Plaintiff, who was the Cogniſee, might bring his Action either againſt the Cogniſor, or againſt the Executor of the dead Executor: Now, here he hath brought the Action againſt the Executor of the dead Executor, who was likewiſe one of the Cogniſors, ſo that all the Teſtator's Goods in his Hands are liable; and the Defendants have pleaded, that they have none *ultra* to ſuch a Value to ſatisfy this Recogniſance; and 'tis uſual, on ſuch a Plea, to give in Evidence Payment of a Bond, in which the Executor was bound with the Teſtator; the Plaintiff had Leave to diſcontinue.

Watſon's *Caſe.* Moor 396.

Debt againſt an Executor, who pleaded *plene Adminiſtravit*; upon which they were at Iſſue, and the Jury found that *his Wife was Executrix* of *W. R.* and that ſhe, to deceive the Creditors, made a fraudulent Deed of Gift of the Goods of her Teſtator, but ſtill continu'd in the Poſſeſſion, and afterwards marry'd the now Defendant, and dy'd, and that he (the Defendant) had Goods in his Hands ſufficient, *&c.* adjudg'd for the Plaintiff, becauſe, by pleading *plene adminiſtravit*, the Defendant had confeſs'd himſelf to be Executor, and therefore ſhall be chargeable; and the rather, becauſe the Property of the Goods was not alter'd by this fraudulent Gift of his Wife, but continued ſtill in her.

Covel *verſus* Devall, 2 Lutw. 1634.

Debt againſt an Executor, who pleaded, that his Teſtator was indebted to one *Lamb* in 300 *l.* by Bond not ſatisfy'd, but ſtill in Force; and that he had fully adminiſter'd, and had not Aſſets *ultra* 10 *l.* to ſatisfy the Debt *Die Exhibitionis Billæ*, nor afterwards; and upon a Demurrer, the Plea was

was adjudg'd ill, becauſe the Defendant pleaded *plene adminiſtravit die Exhibitionis Billæ*, when it ſhould be *ante impetrationem Brevis.*

Debt againſt an Executor, who pleaded *in Bar* that he was Adminiſtrator; adjudg'd this was no good Plea in Bar, but in Abatement: 'Tis otherwiſe where an Action is brought againſt an Adminiſtrator, by the Name of Executor, and Judgment againſt him; for this may be pleaded in Bar to another Action brought againſt him as Adminiſtrator. Harding *verſus* Salkill, 1 Salk. 296.

So where *Aſſumpſit* was brought *againſt an Executor*, who pleaded *in Abatement*, that he was *Adminiſtrator*; upon a Demurrer it was objected, that this Plea was ill, without a Traverſe that he (the Defendant) had adminiſter'd as Executor; but adjudg'd, that the Plea was good without it: The Diſtinction is, where one is ſued as Executor, (as in this Caſe) there needs no Traverſe; but where the Defendant is ſued as Adminiſtrator to *W. R.* if he pleads that he is Executor, he muſt traverſe that *W. R.* dy'd inteſtate, becauſe, unleſs there is a dying inteſtate, an Action cannot be brought againſt an Adminiſtrator; and to plead that he is Executor, is only an Anſwer by Implication to the dying inteſtate. Pooler *verſus* Cook, 1 Salk. 297.

Debt on a Bond againſt an Executor of *W. R.* who pleaded that *W. R.* dy'd inteſtate, and that Adminiſtration was granted to this Defendant, *& petit judicium ſi ipſe ad Billam prædict' reſpondere debeat, &c.* and upon a Demurrer to this Plea, it was inſiſted that it was ill, becauſe the Defendant ſhould have traverſed, that he intermeddled before the Adminiſtration granted to him; for if he did, then he is *Executor de ſon tort*: But adjudged, that ſuch a Traverſe would have made the Plea ill, becauſe there is no intermeddling alledged in the Declaration, therefore the Defendant Powers *verſus* Clocke, 1 Salk. 298.

Defendant ought not to traverſe what is not alledged.

Shelley's Caſe, 1 Salk. 296.

Caſe againſt an Executor, who pleaded *plene adminiſtravit*; it was adjudged, that the Plaintiff muſt prove his Debt, or elſe he ſhall recover but a Penny Damages, tho' there are Aſſets, becauſe this Plea only admits the Debt, but not the *Quantum*; adjudg'd likewiſe, that all Debts in the Inventory ſhall be Aſſets, unleſs a Demand and refuſal to pay is prov'd.

Newton verſus Richards, 1 Salk. 296.

Judgment againſt the Teſtator, and upon a *Scire Facias* brought againſt his Executor, he pleaded *plene adminiſtravit*, and that he had no Goods on the Day of the bringing the *Scire Facias*, nor at any Time after; and upon a ſpecial Demurrer to this Plea it was adjudg'd ill, becauſe the Defendant did not ſhew *how he had fully adminiſter'd*; for againſt a *Judgment* he ought to ſhew *how he adminiſter'd*; 'tis true, upon a general Demurrer it might have been a good Plea.

Executor of an Executor.

See Devaſtavit 229.

See Plené Admin. poſt.

AN Executor of an Executor, is an Executor to the firſt Teſtator, as well as to his own Executor; but each Teſtator's Goods ſtand ſeverally charged with their reſpective Debts, and ſuch Executor may accept the Executorſhip of his own Teſtator, and refuſe to meddle with the Goods of the other: But if he accept the firſt, he cannot refuſe the laſt, unleſs where the Executor of the firſt Teſtator refuſed in his Life-time, or dy'd before Probate; for in ſuch Caſe his Executor ſhall not be ſuffered to adminiſter to the firſt Teſtator, unleſs his Executor was made *Reſiduary Legatee* as well as Executor; and this appears in

Iſted's

Iſted's Caſe, which was thus, *viz.* An Executor (before he proved the Will) made his Executor and dy'd; the Executor of that Executor cannot take upon him the Execution of the Will of the firſt Teſtator, but he may take Adminiſtration of the Goods, *cum Teſtamento Annex'. &c.* Neither can an Executor of an Adminiſtrator have the Adminiſtration of the Goods of the firſt Inteſtate. Iſted *verſus* Stanley, Dyer 372. 1 Roll. Abr. 907. 34 H. 6. 14.

The Creditor dy'd inteſtate, Adminiſtration was granted to *W. R.* who brought an Action of Debt againſt the Debtor, and had Judgment, and dy'd inteſtate before Execution; then Adminiſtration of the Goods of the Creditor, who was the firſt Inteſtate, was granted to the Plaintiff, who brought a *Scire Facias* upon that Judgment, and upon Demurrer it was adjudg'd, that it did not lie, for want of Privity; but that he muſt begin again, tho' it was inſiſted, that the Debt due to the firſt Inteſtate being turn'd into a Judgment, the ſecond Adminiſtrator might have a ſpecial *Sci' Fa'* to execute it. Yare *verſus* Gough, 2 Cro. 4.

The Caſes following ſhew,

(1.) *Where an Executor of an Executor hath an Intereſt, and where he hath none.*

(2.) *Where he is entitled to an Action.*

(3.) *Of Actions brought againſt him, and Pleas to ſuch Actions.*

(1.) *An Executor of an Executor hath an Intereſt,* where the Will was, that his Executors ſhould receive * *the Iſſues and Profits* of his Lands, 'till his Son comes of Age, to pay his Debts and Legacies, and breed up his Children, and he made two Executors, and dy'd; one of the Executors dy'd, and the Survivor made his Executor and dy'd during the Nonage of the Son; adjudged, that * Dyer 210.

that the Executor of ſuch ſurviving Executor, may meddle with the Rents, and diſpoſing the ſame during the Infancy of the Son, as the Will directs, becauſe this was an *Intereſt* veſted in the firſt Executor, and not a bare *Authority*.

But he hath no Intereſt in the Caſe following, 'Tis true, an Executor is an Aſſignee in Law, and ſo is an Executor of an Executor: But if a Man give Bond *to pay* Money to ſuch Perſon as the *Obligee* by his laſt Will ſhall appoint, and he appoint no Body to receive it, his Executor ſhall not have it; for the Words (*to pay*) carry a Property in them, and it muſt be an Aſſignee in Fact, and not in Law, which is intended in this Caſe.

Vaugh 182.

Perſe *verſus* Mead, Hob. 9. 1 Rol. Abr. 915.

* 32 H. 8. Two * Executors, one of them made his Executor, and dy'd, *the ſurviving Executor dy'd inteſtate*, it was held, that the Executor of the Executor who firſt dy'd ſhould not meddle; for by his Death, the Power which he had by the Will was determin'd, as to him, and ſurvived to the other, ſo that the Ordinary might grant Adminiſtration of the Goods of the ſurviving Executor, and likewiſe *Adminiſtration de Bonis non* of the firſt Teſtator.

(2.) *As concerning Actions to which he is entitled,* Dyer 160. *I find this Caſe, &c.* Two Executors, one of them proved the Will, and the other refuſed before the Ordinary, who thereupon granted the Adminiſtration to the other, who made his Executor, and *dy'd*, and that Executor alone brought an Action of Debt, for a Debt due to the firſt Teſtator, and by the Opinion of *Brook* Chief-Juſtice, the Action did lie; for though he who refuſed, might adminiſter, notwithſtanding his Refuſal; yet it muſt be in the Life-Time of his Companion, but when he is dead, his Election is gone. But where an Adminiſtrator got Judgment, and dy'd inteſtate, his

Yel. 83.

his Administrator cannot have an Execution becauſe he is not privy to the Record.

And this agrees with *Brudnell*'s Caſe, *viz.* an Adminiſtrator *durante minore ætate* obtained a Judgment, and dy'd; his Executor brought a *Sci' Fa'* upon that Judgment, and Proceſs was continu'd 'till the Defendant was outlaw'd; then he brought a Writ of Error; and adjudg'd, that an Executor of an Adminiſtrator cannot have Execution upon a Judgment obtain'd by the Adminiſtrator; for no Man ſhall have ſuch Execution but he who is ſubject to the Payment of the Debts of the firſt Inteſtate, and that an Executor of an Adminiſtrator is not oblig'd to do. Brudnell's *Caſe*, 5 Rep. 9.

An Executor of an Executor may avow for Rent due to the firſt Teſtator *in proprio Jure*; as for Inſtance, Leſſee for Years rendring Rent, made *W. N.* his Executor, and dy'd; *W. N.* made *R. B.* his Executor, and dy'd; *R. B.* diſtreined for Rent-arrear, and in *Replevin* avow'd *in Jure ſuo proprio*. It was objected, that for Rent-arrear *in Vita Teſtatoris*, an Action of Debt was the proper Remedy; but it was adjudg'd, that at Common-Law he might diſtrein, by reaſon of the Reverſion, which made the Privity; and that the Avowry was good, tho' it was by an Executor of an Executor *in jure ſuo proprio*. Wade *verſus* Marſh, Latch. 212.

(3.) *And as he may ſue, ſo in ſome Caſes he may be ſued alone*; as where there are two Executors, one made his Executor and dy'd, yet Debt may be brought againſt the Survivor.

But Debt did not lie againſt an *Executor of an Executor*, upon a Suggeſtion of a *Devaſtavit* made by the firſt Teſtator; for it is a Perſonal Wrong for which ſuch Executor ſhall not be charged. And my Lord *Hales* was of Opinion, That it was with Difficulty obtained, that Debt would lie againſt an *Executor himſelf*, upon a Suggeſtion of 1 Vent. 292. *See* antea Tit. Devaſtavit, 229.

Waſte done by him; but that Point being now ſettled, he ſaw no Reaſon to extend the Action farther. However, the Court of *Chancery* thought it equitable to make an *Executor of an Executor* liable to anſwer the *Quantum* of the *Devaſtavit* to Creditors, ſo far as he had Aſſets from his Executor. And about three Years after that Decree, the Parliament thought it reaſonable to provide a Remedy, which was done by a Statute made *Anno* 30 *Car.* 2. by which 'tis enacted, That an *Executor of an Executor ſhall be liable as his Teſtator would have been, where the Goods are waſted or converted.*

Chamberlain *verſus* Chamberlain, 1 Ch. Rep. 257.

30 Car. 2. cap. 7.

About 15 Years before the making this Statute this Caſe happen'd, *viz.* The Teſtator bequeath'd a Legacy, and made the Huſband and *D.* his *Wife* Executors, and dy'd; the Huſband made his Wife and his *Son* Executors, and dy'd; the Legatee exhibited his Bill againſt *D. the Widow, and the Son*, wherein he charged, that the firſt Teſtator's Eſtate, which was liable to pay this Legacy, was come to the Hands of the ſaid *D. and the Son*, whereof one was the ſurviving Executrix of the firſt Teſtator, and the other was the Executor of the dead Executor; and he demurred, becauſe the ſurviving Executrix was only liable, and that he was not privy in Law, nor accountable for the Eſtate of the *firſt Teſtator*: But decreed, that his Eſtate ought to be liable, into whoſe ſoever Hands the ſame ſhould come.

Nicholſon *verſus* Sherman, 1 Ch. Rep. 57 Raim. 23. 1 Sid. 45.

Executor, his Right excluſive from the Heir.

THE Things to which an Executor is entitled by the Law, excluſive from the Heir, are either in Poſſeſſion, or in *Action*.

See Tit. Preſentation.

The

The possessory Things are *Chattels Real*, as Leases determinable upon Lives, or Leases for Years; 'tis true, such Leases are not in Possession till an actual Entry on the Lands, unless it is a Lease of Tythes, where no Entry can be made. Arrears of Rents issuing out of Houses or Lands, the Grantee of the next Presentation to a Church, dying, his * Executor shall present: So if a Lease is made to a Bishop and his Successors, his ‖ Executor shall have it; and in some Cases the Rent it self shall go to the *Executor*, as for Instance:

*Dyer 283
‖ Co. Lit. 46

A Man possessed of a Term for 100 Years dy'd *Intestate*, Administration was granted to *his Wife who made a Lease for Five Years* to *R. B.* rendring Rent to her, or her *Executors* or Assigns. Afterwards she made a Will, and appointed the Plaintiff to be Executor, and dy'd. The Question was, Whether this Executor of an Administratrix, or the *Administrator de Bonis non* of the Intestate, should have the Rent? It was insisted, that the Administrator *de Bonis non*, *&c.* should have it as incident to the Reversion, and that the Covenant shall go with the Rent; but adjudged, that the Executor of the Administratrix shall have it, because he comes in under the Lease made by her, and may maintain an Action of Covenant on the Personal Contract of the said Administratrix, which the Administrator *de Bonis non* cannot; for he must come in paramount the Lease upon which this Reservation was made.

Norton *versus* Harvy, Drew *versus* Bailey, 1 Vent. 259, 275. 2 Lev. 100.

So were the Testator devised to *R. B.* the Rent and Profits of his Estate for 15 Years in Trust to pay his Debts, *&c.* and the Residue of his Goods and Chattels to the said *R. B.* whom he made Executor. The Trust was performed, and there was an Overplus of the 15 Years; and it was insisted for the Heir, that the Term being raised out of the Inheritance, shall return to it again and

Gore *versus* Blake, 1 Ch. Rep. 98.

ceaſe, after the Truſt was perform'd: But it was decreed, that an Intereſt paſſed by theſe Words, and the Executor ſhould have the Reſidue of the Term.

He is likewiſe entitled to Things in *Action*, as to the Right of Execution on a Judgment, Bond, or Statute; he is alſo entitled to all Perſonal Goods and Chattels, of what Nature, Kind, or Quality ſoever the ſame are; and theſe are accounted in his Poſſeſſion, though not actually ſo, and he may maintain Treſpaſs for them.

And as to Corn ſow'd, if Tenant for another Man's Life ſow the Land, and they both die before the Corn is ripe, the Executor of the Tenant ſhall have the Corn.

The Caſe is the ſame where Tenant in Tail ſoweth the Land, and dieth, his Executor ſhall have it.

So where the Wife hath an Eſtate in Fee in Tail for Life or for Years, and the Huſband ſoweth the Land and dieth, his Executor ſhall have the Corn.

Dyer 316. The Huſband made a Feoffment to another to the Uſe of *himſelf and his Wife for their Lives*, Remainder to his right Heirs; then he ſow'd the Land, and made his Executor, and dy'd; it was a Queſtion, who ſhould have the Corn. The Judges were divided in Opinion; ſome held that the Wife, who was the ſurviving *Joint-tenant*, ſhould have it, eſpecially ſince the Joint-tenancy was made by the Huſband himſelf, during the Coverture: But it was ended by an Award of two of them, who gave the Executor a fourth Part of the Corn after it was thraſh'd.

Co. Lit. 199. And yet my Lord *Coke* tells us, and ſo is the Law, That if Huſband and Wife are Joint-tenants of Land, and the Huſband ſowed it and die; his Wife, and not his Executor ſhall have the Corn.

But

But Goods which two have in Common, shall go to the Executor of the deceased. Co. Lit. 182.

As to Mortgage Money *Littleton* tells us, That if the Mortgagee in Fee die *before the Day of Payment*, and his Heir enter on the Land *after the Day of Payment*, yet the Money shall be paid to his Executor. And my Lord *Coke* in his Comment on it affirms, That the Executor doth more represent the Person of the Testator, than the Heir doth that of the Ancestor; for though he is not named, the Law appoints him to receive the Mortgage-Money, because it was at first a Duty to the Mortgagee, and the Estate was made to him by Reason of his lending the Money to the Mortgagor; and therefore the Payment shall not be made to the Heir, unless the Condition of Redemption was, That the Mortgagor should pay the Money to the Mortgagee or *his Heirs*; in such Case if the Mortgagee dieth before the Day of Payment, it shall go to his Heirs, for *designatio unius est exclusio alterius*: But if 'tis to be paid to the Heirs or Executors, the Mortgagor may pay it to either. 1 Inst. 209. b.

The Testator being possess'd of a Term for Years, devis'd it to *A.* for Life, and so to *B.* for Life, and likewise to five more successively for Life; they all dy'd and the Question was, Who should have the Residue of the Term? Adjudged, that this Devise to all of the Devisees was good, and that the first Devisee, and so every other Devisee in his Turn, had the whole Term vested in him, and the next in Remainder had but a *Possibility*, and no more, and the Executor of the Testator had but a *Possibility of Reverter*; now here the Testator gave but a limited Estate, and what he did not give away, must remain in him, and by Consequence must go to his Executor. Eyre *versus* Falkland, 1 Salk. 231

Executory Deviſe of a Fee-Simple.

'TIS a Rule in Law, That a *Remainder* (which is no more than the Reſidue of an Eſtate) cannot be limited after a *Fee-Simple*, becauſe when a Man hath parted with his whole Eſtate, nothing can *remain* for him to diſpoſe.

But this Rule hath been evaded by diſtinguiſhing between an *Abſolute* and a *Conditional Fee* which depends on a *Contingency*, and which is to ceaſe in one, and be transferred to another when the *Contingency happens*; ſo that now 'tis no longer doubted, but that a Fee may remain and ariſe out of the *Firſt Fee* conditionally limited, and this may be either by Way of Uſe or by *Deviſe*, and when ſuch a Remainder is limited in a Will, 'tis called an *Executory Deviſe*; that is, where a Man deviſeth a Fee-Simple to one to be veſted in another upon a *Contingency*.

And where there is ſuch a Deviſe, there needs not any *particular Eſtate* to ſupport it, becauſe the Teſtator hath not parted with his whole Eſtate in the firſt Limitation; for ſomething ſtill remains in him, and which after his Death may deſcend to his Heir till the *Contingency* happens; and becauſe 'tis not a *preſent* but a *future and contingent Intereſt*, therefore a common Recovery will not bar it.

'Tis true, a Deviſe of a *Remainder* after a *Fee-Simple*, was unknown to former Ages, and therefore *Anno* 28 *H.* 8. where the Deviſe was to the *Prior and Convent of St.* Bartholomew, *and his Succeſſors*, paying Rent to the *Dean and Chapter of* Paul's, and if they fail in Payment, that their Eſtate ſhould ceaſe, and the *Dean and Chapter of* Paul's, and their *Succeſſors*, ſhould have it; this was adjudged void by *Baldwin* and *Fitzherbert*, be-

cauſe

cauſe nothing could remain after a Fee-Simple was given, and they were the greateſt Lawyers of that Age. Dyer 33.

But 'tis with great Reaſon that Remainders ariſing upon a *Contingency* are now allowed, even after a Deviſe of an Eſtate in *Fee Simple* thus diſtinguiſhed; for this ſtands upon the Reaſon of the old Law, which always allow'd very favourable Diſtinctions to ſupply the Meaning of the Teſtator, whoſe Intent is chiefly to be obſerved in his laſt Will; and therefore in theſe Executory Deviſes, when it appears by the Will that he intended the ſecond Deviſee ſhould not take any preſent but a future Intereſt, and made no Diſpoſition of it, in the mean time, it ſhall deſcend to the Heir till the Contingency happens.

The firſt Remainder that I find limited after a conditional Fee Simple by Deviſe, and which was allowed to be good, was *Anno* 20 *Eliz.* which was a Deviſe to his Wife, until his Son ſhould be 24 Years old, and then one Third to his Wife for Life, the Reſidue to his Son *and his Heirs*; and *if he die before* 24, *and without Heirs of his Body*, Remainder to his Wife for Life, Remainder to a Daughter in Tail, Remainder to his own *right Heirs*: Now here was a Remainder limited after a Fee-Simple, and by *Dyer* and *Manwood* it was held good; for it was not limited upon the Sons dying without *Heirs of his Body generally*, but upon his dying without Heirs, *&c. before he was* 24 *Years old*; ſo that it being a Remainder depending upon a Contingency, which might happen in a few Years, it was held good: But that Contingency never happening (for the Son lived till he was above that Age) therefore he held no Eſtate Tail, but a Fee-Simple. Hind *verſus* Lyon, Dyer 124. 2 Leon 11. 3 Leon 64. 1 Roll. Abr. 839.

But a *Remainder* to ariſe upon a *Contingency*, cannot be limited after an *Eſtate-Tail*; and there-

fore where an Eſtate of *Inheritance* is deviſed *to one*, and to *remain* to another upon a *Contingency*, it has been always conſidered, whether the firſt Eſtate is a *Fee-Simple* or a *Fee-Tail*, either expreſs or by Implication; for if the latter, there can be no executory Deviſe after it, for that would tend to a Perpetuity, and ſo is *Clutche*'s Caſe.

Clutche's *Caſe*, Dyer 330. 1 Roll. Abr. 835, 839.

Ff. The Teſtator had two Daughters, two Grandaughters, and two Houſes; and deviſed one Houſe to his eldeſt Daughter and *her Heirs*, and the other to the youngeſt Daughter and *her Heirs*, and *if ſhe died before ſixteen, living the eldeſt*, then that Houſe to the eldeſt and her Heirs; and *if both his Daughters died without Iſſue*, then he deviſed the Houſes to his Grandaughters and their Heirs. It was the Opinion of *Dyer*, that theſe Words in the Will, *viz. if both his Daughters die without Iſſue*, did not create croſs Remainders in Tail to them by Implication, for then the Deviſe to his Grandaughters had been void, but each of them had a Fee-Simple conditional immediately, *viz.* the eldeſt if ſhe ſurvived her Siſter dying before ſixteen, and the youngeſt if ſhe ſurvived that Age, and the Eſtate-Tail was to ariſe to the eldeſt upon the youngeſt Daughter's dying before ſixteen; for 'tis plain, ſhe was not to have that Houſe, unleſs the youngeſt had died before that Time, and the Eſtate-Tail to her being to ariſe upon that Contingency, (which never happening, for the youngeſt died after ſixteen) then the Caſe was no more than a Deviſe of a Houſe to the youngeſt Daughter and her Heirs, and *if ſhe died before ſixteen, living the eldeſt*, then to her and her Heirs, which is a Remainder limited after a conditional Fee, and good by Way of executory Deviſe.

Wellock *verſus* Hammond Cro. Eliz. 204.

About 17 Years afterwards it was allowed, that in a Deviſe a Fee may ceaſe in one, and be transferr'd

ferr'd to another by the Law, without an expreſs Limitation of the Party.

However this was a Point which was not well ſettled, for about ſeven Years afterwards there was a Deviſe to his Son *and his Heirs*, and *if he die within Age, and without Iſſue*, Remainder over, *&c.* it was held clearly, that if the Deviſe had been to him and his *Heirs*, and if he died *without Iſſue*, Remainder over, it had been an Eſtate-Tail in the Son; for the Word *Iſſue* ſhews what *Heirs* were intended, *viz.* Heirs of his Body iſſuing: But it being to him and his Heirs, *and if he die within Age*, Remainder over, they rejected thoſe Words, and made that Limitation utterly void, becauſe they would not allow any Remainder to depend on a Fee, tho' it was to ariſe upon a *Contingency* of the firſt Deviſees dying *within Age* as well as without Iſſue.

Saul *verſus* Gerard, Cro. Eliz. 225. Moor 422.

But notwithſtanding this Caſe, it ſeemed very reaſonable to ſupport ſuch Remainders, after Fees determinable upon a Contingency, and make them good by many ſolemn Reſolutions, in order to obſerve the Intention of the Teſtator, and to perform his Will.

And therefore about four Years afterwards it was adjudged, that though a Fee could not be limitted after a Fee-Simple, yet a Fee to ariſe upon a Contingency was good by Way of Executory Deviſe.

As for Inſtance, the Teſtator had two Sons and a Daughter, and deviſed Money-Legacies to his youngeſt Son and Daughter, to be paid by his eldeſt Son, and deviſed his Lands to him and his Heirs, upon Condition that *if he did not pay the Legacies*, that the Land ſhould be to them and *their Heirs*. Now, here was a future Remainder in Fee limited after a Fee, but it was upon a Contingent, *viz.* if the eldeſt Son failed in Payment

Hainſworth *verſus* Pretty, Cro. Eliz. 833 Noy 51.

ment of the Legacies, and this was held good by Way of executory Deviſe to them; and in this Caſe the Son himſelf determined his Fee-Simple in not paying the Legacies.

About 18 *Years afterwards the Law became ſettled in this Point, in a noted Caſe between* Pell *and* Brown, *which is reported in many Books.*

Pell *verſus* Brown, Godb. 282. 2 Roll. Rep. 196. Palm. 131. Bridgm. 1. 2 Cro. 590. 1 Roll. Abr. 611, 836.

If. The Teſtator deviſed his Lands to his youngeſt Son and *his Heirs*, and *if he died without Iſſue, living the eldeſt*, then to the eldeſt Son and *his Heirs*. The youngeſt Son ſuppoſing he had an Eſtate-Tail, ſuffered a common Recovery, then ſold the Lands, and died without Iſſue, *living the eldeſt*: It was adjudged, againſt the Opinion of *Dodderidge*, That the youngeſt Son had not an Eſtate-Tail, nor an abſolute Fee-Simple, but a Fee-Simple Conditional, and that the eldeſt Son had an Eſtate in Fee, which was to ariſe upon the Contingency of his Brother's dying without Iſſue in his Life-time, which could not be barred by the Recovery, becauſe the Remainder to him was not in Being till the Contingency happened, it was a Remainder which did not depend upon any particular Limitation, but upon a collateral Determination of the firſt Eſtate; for the Words, *viz. If he die without Iſſue, &c.* are not abſolute and indefinite, but a tied up to a Contingency, *viz. living the eldeſt*; and ſuch a Remainder being only to take Place upon a future Poſſibility, may depend upon a Conditional Fee, and in this Caſe the Fee determined by the Son's dying without Iſſue in the Life-time of his Brother.

Gilbert *verſus* Witty, 2 Cro. 655. 2 Roll. Rep. 281.

Two Years afterwards the Teſtator having three Sons and three Houſes, deviſed one Houſe to his eldeſt Son and *his Heirs*, and another Houſe to his youngeſt Son and *his Heirs*, and ſo to the third, *provided if all my Children die without Iſſue of their Bodies*, then all my Houſes ſhall be to *Margery*

gery and her Heirs. The two eldeſt died without Iſſue; adjudged, that *Margery* ſhall have their Houſes immediately; for the Words *dying without Iſſue of their Bodies*, did not make croſs Remainders in Tail to them by Implication, ſo as to entitle them to the Houſes of each other, becauſe there was an expreſs Eſtate in Fee, limitted to each of them in the firſt Part of the Will; and the Deviſe to *Margery* in Fee afterwards was allowed to be good, becauſe it was to ariſe upon the Contingency of the Sons dying without Iſſue.

The next in order of Time, was a Deviſe to one and his Heirs, and *if he died without Iſſue, living R. B.* or *if he die before* 21, that then it ſhall remain, *&c.* this makes a Fee-Simple Conditional immediately, and the Words *if he die without Iſſue* make an Eſtate-Tail, which is not to ariſe but upon a future Contingency, *viz.* if he die without Iſſue, *living R. B.* Chadock *verſus* Cowley, 2Cro. 695.

But a Deviſe to *Thomas* his eldeſt Son and *his Heirs*, and a Deviſe of other Lands to *Francis* his Son and *his Heirs, and if either die without Iſſue, the Survivor ſhall be Heir to the other*; this is an Eſtate-Tail immediately, ſo great a Difference there is where the Limitation is upon a *dying without Iſſue generally*, and dying without Iſſue *in the Life-time of another*, for the laſt only makes it an Executory Deviſe.

And to ſhew that a Remainder cannot be good after an abſolute Fee, this Caſe happen'd: *ſſ.* A Deviſe of his Lands in *H.* to *John* his eldeſt, and other Lands ſeverally to his two other Sons, (but did not limit what Eſtate they ſhould have) *and that if any of them died* (but did not ſay without Iſſue) *the other ſurviving ſhall be his Heir. John* the eldeſt Son had Iſſue and died; adjudg'd, That the Lands in *H.* ſhall not veſt in the ſurviving Sons Wood *verſus* Ingerſole, 2Cro 260. 1Bulſt. 61.

Sons by Way of Executory Deviſe; for *John* having only an Eſtate for Life by the Will by Implication, that Eſtate was drowned by the Deſcent of an abſolute Fee upon him who was the eldeſt Son, and by Conſequence the Remainder which was to veſt upon the Contingency of dying without Iſſue, was deſtroy'd, for the eldeſt Son had a pure and abſolute Eſtate in Fee, which ſhall deſcend to his Iſſue. But *Flemming*, Chief Juſtice, ſaid, That the Freehold was not ſo abſolutely merged in the Inheritance, but that it might revive upon the Death of *John*, and his Part remain to his Brothers by Way of executory Deviſe, and ſo it hath been ſince adjudged in *Forteſcue* and *Abbot*'s Caſe.

In a ſpecial Verdict in Ejectment the Caſe was, *Robert Edge* being ſeiſed in Fee, deviſed his Lands to Truſtees *for* 11 *Years*, then to the *firſt Son of W. R.* and the *Heirs Males of his Body*, and ſo to the ſecond and third Sons in Tail, *provided they take on them his Surname of* Edge, which if they refuſe to do, *or die without Iſſue*, then he deviſed the Lands to the firſt Son of *T. P.* in Tail, with the like Proviſo; and if they refuſe, *&c.* then to the right Heirs of the Teſtator for ever; *W. R.* the firſt Deviſee, *had no Son at the Time of the Deviſe*, and died without Iſſue, *T. P.* had a Son at the Time, who took upon him the Surname of *Edge* the Teſtator; adjudged, That the Deviſe *to the firſt Son of* W. R. *and the Heirs Males of his Body*, was not a Contingent Remainder, but an executory Deviſe, becauſe the precedent Eſtate to the Truſtees was *for* 11 *Years*, which Eſtate cannot ſupport a Remainder, neither can a Remainder be limited after a Fee-Simple, becauſe after ſuch a Deviſe nothing remains to diſpoſe. Then admitting this to be an executory Deviſe, 'tis void; for all ſuch Deviſes are *preſent or future*; if *preſent*, the

the Party must be in Being, and capable to take at the Time of the Devise, which he was not in this Case, *because* W. R. *had no Son*, and 'tis plain 'tis a present Devise, and not like the Case of a Devise to an *Infant in Ventre sa mere*; because there the Testator takes Notice, that the Devisee is in his Mother's Womb, and for that Reason he must intend it as a future Devise to such Child. But admitting in the principal Case, that this is a future and executory Devise, 'tis still void, because such a Devise must arise within the Compass of one Life. There are three Sorts of executory Estates, one is where the Testator parts with the whole Fee-Simple to another, but qualifies it upon some Contingency, and limits another Fee upon such Contingency, and this is altogether new in the Law: The second is where the Testator devises a future Estate to arise upon a Contingency, but retains the Fee-Simple till that Estate arises: A third Sort is of a Term for Years, which is well settled in *Matthew Manning*'s Case, and the Boundary of these executory Devises have not yet been extended beyond one Life or Lives.

Scatterwood *versus* Edge, 1 Salk. 229.

From what has been said it may be observ'd, that executory Devises of a Fee Simple are allow'd after Conditional Fees, where the Contingency may happen in a few Years, or in the Course of one or two Lives; and therefore they are good where the Devise is to *B.* and *his Heirs*, and afterwards to *D.* and *his Heirs*, if *B.* die *without Issue in the Life time of* D. but not if *B.* die without Issue *generally*; for 'tis too remote an expectancy of a Fee, after another dying without Issue *generally*.

So where a Devise was to *Roger Alford* and others, and *their Heirs*, upon Condition to pay the Profits, *&c.* as directed in the Will, and if any Part of the Purposes in the Will remained unperformed,

London *Lord Mayor versus* Alford, Cro. Car. 575. W. Jones 452.

unperformed, then he deviſed the Lands to the Mayor and Commonalty of *London*, and *their Succeſſors for ever*, upon the ſame Conditions; this laſt Part of the Will was adjudged a void Limitation, becauſe 'tis too remote to expect a Fee which is to veſt upon the Failure of a Man *and his Heirs* to pay the Profits, *&c.*

Jay *verſus* Jay, Stiles 258.

But notwithſtanding the Judgments before-mentioned, the Court inclined in *Jay* and *Jay*'s Caſe, that a Deviſe to *R. B.* and *his Heirs*, and if he die *living his Mother*, Remainder to *W. N.* and *his Heirs*, that this Remainder was void, becauſe it was a Limitation of a Fee after a Fee.

Snow *verſus* Cutler, 1 Sid. 153. Raim. 162. 1 Lev. 135.

However, this is but one Inſtance, and no Judgment was given in it, but ſometime afterwards there was a Deviſe to the *Heirs of the Body of the Wife, if they attain the Age* of 14 Years; this was adjudg'd an executory Deviſe to the Child, to ariſe upon a Contingency, *(viz.) if he lived till* 14, and in this Caſe there was a double Contingency, (*viz.*) the Wife was to have *Heirs of her Body*, and they were to attain to the *Age of* 14 *Years*; it did not veſt as a Remainder in Tail to the Wife, tho' ſhe had an Eſtate for Life before, for it was not a Remainder joined to that Eſtate, and ſo to veſt in her Life-time, but it was a new Deviſe to take Effect after her Death.

Forteſcue *verſus* Abbot, T. Jones 79. 2 Lev. 202.

The next was a Deviſe of Lands to his eldeſt Son, and a Deviſe of other Lands to his other Children reſpectively, without limiting for what Eſtate, and *if either of my Children die, then his Part ſhall be equally divided amongſt them*; *John* the eldeſt Son died, and whether his Part ſhould remain to the Survivors, was the Queſtion; it was inſiſted, that it ſhould not; for tho' there was no expreſs Eſtate deviſed to *John*, or to any of the Children, yet he had an Eſtate *for Life* by Implication, and ſo they had all; but the Fee-

Simple

Simple deſcending upon him as Heir at Law, that Eſtate for Life was merged, and by Conſequence the Remainders were deſtroy'd, for he became ſeiſed of an abſolute Fee by Deſcent, and ſo his Part ſhall go to his Heir, and not to his Brothers; and ſo it was adjudged in *Wood* and *Ingerſole's* Caſe before mentioned; but contrary to the Opinion of the Chief Juſtice *Flemming* in that Caſe, according to whoſe Opinion it was reſolved in this Caſe, That the Freehold was not ſo entirely drowned in the Inheritance, but that it might revive upon the Death of the eldeſt, and his Part remain to the younger Children for their Lives by Way of executory Deviſe. Ante 283.

So where the Teſtator gave ſeveral Lands to each of his Sons in Fee; Proviſo, if either of them die *before they are married, or before* 21, *and without Iſſue of their Bodies*, then to the Survivor; one of the Sons married, and had a Daughter, and died, the other came of Age, and died unmarried; it was adjudged, That this was not an Eſtate Tail in the Sons, but a contingent Fee to ariſe upon their Marriage or Death before they came of Age. Hanbury *verſus* 1 Roll. Abr. 836.

So a Deviſe of the Rents and Profits of his Lands to raiſe Portions for his Daughters, and afterwards to the Uſe and Benefit of his Son *George*, and *if it happen that* George *and his Daughters die without Iſſue of their Bodies*, then to remain and be to *William Roſe* and his Heirs; adjudged, That this was no Deviſe to *George* and the Daughters for their Lives, with reſpective Inheritances in Tail by any neceſſary Implication, but by a grammatical and common Intendment the Words import a Deſignation of the Time when the Lands ſhall come to *William Roſe* and his Heirs, (*viz.*) when *George* and the Daughters die Gardner *verſus* Sheldon, Vaugh. 259.

die without Iſſue, and not before; and the Intention of the Teſtator muſt be thus; (*viz.*) I leave my Land to deſcend to my Son *George* and his Heirs, until he and his Siſters ſhall die without Iſſue, or *George* and his Heirs ſhall have my Land as long as any Heirs of the Bodies of him or his Siſters are living, and for Want of ſuch Heirs, I deviſe the ſame to *William Roſe* and his Heirs.

Not long after a Fee was allowed to ariſe after the Limitation of another Fee determinable upon a Contingency; it became a Queſtion, Whether a Leaſe for Years, which is no more than a Chattel, would bare ſuch a contingent Limitation.

De Tit. Term for Years.

The Reaſons which at firſt prevail'd were, That it would not bare any Manner of a Remainder, and by Conſequence no contingent Remainder.

(1.) *Becauſe of the Poverty and Meanneſs of a chattel Intereſt.*

(2.) *Becauſe a Deviſe of a Chattel for an Hour, was ſo for ever.*

In Anſwer to the firſt of theſe Reaſons, there is no Manner of Difference between an *Inheritance* and a *Chattel* in reſpect to the Owner, but only in the Duration of the Eſtate, as the Lord Chancellor *Finch* rightly obſerved in the Duke of *Norfolk*'s Caſe; for a Man hath as abſolute a Power over his Leaſe, as he hath over his Inheritance, and it frequently happens, that all which he hath conſiſts in Leaſes; and it ſeems very abſurd to ſay, That he cannot provide for the Contingencies of his Family, becauſe his Eſtate is all in Leaſes.

'Tis

'Tis true, one or both these Reasons did once prevail, for *Anno* 6 *Ed.* 6. there was a Devise of a *Term of Years* to one; provided, That *if he die, living R. B.* that it should *remain to* W. N. *during the Residue of the said Term.* This Remainder was held void by the Chief Justice *Montague* and *Hales*, who were then Judges of the Common Pleas; and *Hales* said, so it was ruled by all the Judges in the Time of the Lord Chancellor *Rich*, in the Beginning of that King's Reign. Dyer 74.

About 10 Years afterwards the Judges of the King's-Bench were of another Opinion, (*viz.*) That a *Devise of a Term to one for Life, Remainder to another*, was good; but it seems the Law was not settled, because of these contrary Opinions; and therefore my Lord *Dyer*, who reports the Case, puts a *Quære* to it. Dyer 217. B.

About 5 Years afterwards the Testator devised a *Term of Years to his Son* (who was then an Infant) *when he should be of Age*, and devised the *Occupation and Profits to his Wife in the mean time*, and made her Executrix, and died; the Widow proved the Will, and sold the Term, and afterwards the Son came of Age; my Lord *Dyer* puts another *Quære*, what Remedy the Son had for this Term, because the Judges were divided in Opinion, by which it must necessarily follow, that some held the Devise over to her to be good. Dyer 328. B.

But about four Years afterwards they all agreed such a Remainder to be good, the Case was thus:

If. The Testator devised, That *his Wife should have all the Land in the Lease of sixty Years, for so many Years as she should live, and after her Decease the Residue to his Son and his Assigns*, and made the Wife Executrix, and died; it was adjudged, That this Remainder was good, and the Wife could do nothing to defeat it, and to support this Judgment the Court made a Distinction, which pro- Dyer 338. B.

bably was unknown to the Teſtator, *viz.* that there was *Jus Poſſeſſionis & jus Proprietatis*, and that by the Will he did not intend the abſolute Property and *Right* of the Term for his Wife, but only the *Poſſeſſion* for ſo many Years as ſhe ſhould live, tho' there was a Poſſibility ſhe might ſurvive the whole Term, and that the Propriety of the Reſidue was intended for the Son; and this my Lord Chancellor *Finch* tells us, was the firſt Time that an executory Remainder of a Term was held good.

If then a Term for Years will bare a *Remainder*, upon the ſame Reaſon it will bare a *Remainder over upon a Contingency*; eſpecially where that Contingency may wear out in the Courſe of a Life; and ſo it was adjudg'd above 40 Years before, as 'tis reported in the ſame Book.

Dyer 7. *If.* A Deviſe of a *Term* of Years to his Daughter and the *Heirs of her Body*, Remainder to his ſecond Daughter *in Tail*; 'tis true, this *Remainder* was held void, becauſe the Teſtator had deviſed the *whole Term* to his eldeſt Daughter; and there was another Reaſon given, which was, That the Law would not allow any Remainder of a Term; and yet in that very Caſe they allow'd that a *Remainder of a Term which was to ariſe upon a Contingency* was good; as if the Teſtator had deviſed a Term of Years to *R. B.* and *if he had died within the Term*, that *W. N.* ſhould have the Reſidue; ſuch a Remainder was good, becauſe he had not diſpoſed the whole Term to the firſt Deviſee, but only ſo much which might expire in his Life-time; and *Baldwin*, who was then Chief Juſtice of the Common Pleas ſaid, That when he was a Serjeant he mov'd the ſame Caſe to the Court, and they were all of that Opinion.

‖ Welkden *verſus* Elkington, Plow. Com. 519. ‖ So where Leſſee for Years deviſed that his Wife *ſhould have the Occupation of the Lands for ſo many* Years

Years as she should live, and after her Death *the Residue to his Son*, and made her sole Executrix, and died; the Widow agreed to the Legacy, and sold the Term, and then she died before the Lease was expir'd; adjudg'd, That this was not a Devise of the whole Term to the Wife, but conditionally, *if she live so long*, and her Interest was to be determin'd on her Death, so that the Sale of the Term by the Wife was void against the Son, because the Remainder was to arise to him upon the Contingency of her *dying* before it was expir'd, and the Devise to him shall be expounded to *precede* the Devise to the Wife, that both may stand, for there was no express Estate *for Life* devis'd to her; if it had been so, then she would have a Title to the whole Term, because an Estate *for Life* is more valuable in Judgment of Law than an Estate for Years.

In the next Year Lessee for Years devis'd *all his Term to his Son*; and farther said, that his Will was, That *his Wife should have the Occupation and Profits of the Land during his Minority* to educate his Children, and see his Will perform'd, and made her *Executrix*, and died; she proved the Will, brought up the Children, and sold the Term, and died; adjudg'd, That her Sale was void against the Son; for to make the Devise good to him it shall be intended, That the Devise to the Wife shall precede the Devise to the Son, tho' it followeth in Words, and that she had not the whole Term, but only Part of it, (*viz.*) during the Nonage of the Son, and if he liv'd to his full Age, then the Remainder was to vest in him upon that Contingency.

Paramour versus Yardly; Plow. Com. 53.

‖ Annes versus Lodington, 1 And. 61. 2 Leon 92. 3 Leon. 89. Godb. 26.

‖About five Years afterwards there was a Devise of a *Lease* to his Wife *for Life*, and after his Death to his Children unpreferr'd; those who would have the Wife entitled to the whole Term, distin-

guiſh'd this Caſe from that of *Welkden* and *Elkington*, where the Deviſe was, That the Wife ſhould have the *Land* in Leaſe *for ſo many Years as ſhe ſhould live*, and from the Caſe of *Paramour* and *Tardley* where the Wife was to have the *Profits of the Land* until her Son came of Age; but in this Caſe the *Land* is not mentioned, but the *Leaſe it ſelf* was deviſed; but adjudg'd, That the Wife had only an Eſtate for ſo many Years as ſhe ſhould live, and if any remained after her Death, they were intended upon that Contingency to the Children unpreferr'd.

Mallet *verſus* Sackford, 2 Cro. 198. 1 Roll. Abr. 610.

About two Years before *Manning's* Caſe, there was a Deviſe to his Wife and his Couſin for *their Lives*, and afterwards, that the Term ſhould be *to ſuch Perſons as ſhall remain in his Houſe at* Norming-ton *at the Time of his Deceaſe*; the Wife ſurvived the Couſin, and aſſigned the Term to *R. B.* under whom the Defendant claimed. Juſtice *Croke*, who reports this Caſe, tells us, That the Court was divided upon the Queſtion, Whether the Remainder was good or not? becauſe it was contingent whether any of the Term might be in being after the Death of the Wife, and ſuch a Contingency could not be limited by Way of Remainder; but my Lord *Rolls*, who reports the ſame Caſe, tells us, That the firſt Deviſees had the whole Term in them by Virtue of the Deviſe, and ſo nothing was left to ſupport any Remainder by the Rules of the Common Law, yet it was good to the ſecond Deviſee by Way of executory Deviſe.

Foſter *verſus* Brown, Moor 758.

And now one would wonder, that after all theſe Caſes it ſhould ſtill remain a Queſtion at that Time, whether there could be a Remainder of a Term, after a Deviſe thereof to another *for Life*; but I think the Law was ſettled, That it could not be limited in Remainder after an Eſtate Tail.

The

The next Case of this Nature which happen'd, was *Matthew Manning's* Case, *viz.* Lessee for Years of a Farm and Mill, devised the Use and Occupation thereof to his Wife *for Life*, and afterwards to *Matthew Manning* his Son, for the Residue of the Term, and made his Wife Executrix, and dy'd; Justice *Walmsley* was of Opinion, that the Devise to the Son after the Death of the Wife was void; for by the Devise to her *for Life*, she had the whole Term; and there being only a Possibility that she might die before it was expired, that Possibility could not be devised over; but adjudged, that the Son did not take by Way of Remainder, but by Way of executory Devise, *viz.* if the Wife die within the Term, that then the Son shall have the Residue; so that the Remainder was to vest in him upon the Contingency of the Wife's dying within the Term; and in this Case it was held, that where a Man deviseth a Term with Remainder over, there is no Manner of Difference where 'tis either of the *Land it self*, or the *Lease*, or the *Farm in Lease*, or the *Use*, or *Occupation*, or *Profits* of the Land; because in Wills the Intent of the Testator is to be observed, and the Law will make such a Construction of the Words as may consist with such Intention. Matthew Manning's *Case*, 8 Rep. 94.

Anno 9 *Jac.* The Testator devised a Term to his Wife *for Life*, and afterwards that *John* should have the *Occupation* of it as long *as he had Issue*; and if he dy'd without Issue *unmarry'd*, then *Jaspar* should have the *Occupation* of it as long as he had *any Issue of his Body*; and if he dy'd without Issue *unmarry'd*, Remainder over, *&c.* They both dy'd without Issue, and unmarry'd; adjudg'd, that the Remainder was good, because the Devise was of the *Occupation of the Term*, and not of the *Term it self*; and yet in *Manning's* Case it was held, that made no Difference; besides, the Li- Rhetorick *versus* Chappel, 2 Bulst. 28. 1 Roll. Abr. 610.

mitation in this Caſe is, if he die without Iſſue *unmarry'd*, which is the ſame Thing as if it had been, *if he die within the Term*; for if he is not marry'd, he cannot have Iſſue, and then the Remainder is to ariſe upon the Contingency of one Man's dying within the Term, which is good; but 'tis otherwiſe where the Deviſe was of the *Term it ſelf*; as for Inſtance,

Child *verſus* Bailie, 2 Cro. 459. W. Jones 15 2 Roll. Rep. 129. Palm. 48, 333. 1 Roll. Abr. 613.

The Teſtator being poſſeſſed of a *Term* of 76 Years, deviſed it to his *Wife for Life*, then to *William and his Aſſigns* for all the reſt of the Term, *provided, if* William *die without Iſſue then living*, that *Thomas Heath* ſhould have it. *William* dy'd without Iſſue, and *Thomas* ſurvived; adjudged, that this Deviſe of a Remainder of a Term was void, for it being firſt limited to *William and his Aſſigns*, the whole Term is veſted in him; and this is imply'd by the Word *Aſſigns*, which Word gives him Power to diſpoſe of the whole; beſides, the Remainder to *Thomas* depends upon two Contingencies, for the Term to *William* is not to commence *'till after the Death of the Wife*, and ſhe might have ſurvived the whole Term, and 'tis not to commence to *Thomas 'till after the Death of* William *without Iſſue*; therefore to limit it to him after the Death of *William*, *&c.* is to limit one Contingency upon another, and the laſt is ſo remote, that the Law will never expect it, *viz.* the Death of *William without Iſſue*, becauſe by a common Poſſibility, an Eſtate Tail may continue for ever; for which Reaſon, a Reverſion of Lands in Fee, after the Determination of an *Eſtate Tail*, is of ſo little Value in Law, that 'tis not Aſſets in the Hands of the Heir, and much leſs a Remainder of a Chattel after an Eſtate Tail; 'tis true, a Deviſe of a Term to *William* for Life, * *and if he die without Iſſue, (living Thomas)* then that *Thomas* ſhould have it; this hath been adjudged good,

* Johnſon *verſus* Lewknor, 1 Roll. Abr. 610. *cited in* W. Jones 15

becauſe

because 'tis certain that one must die, and probably within the Term, and the Law may well expect it; but a Devise of a Term to one, and the *Heirs of his Body*, and if he die *without Issue*, that it shall remain to another, this is void, because the first Limitation to the *Heirs of his Body* is a Limitation of the whole Term; for 'tis in Probability for ever; and 'tis the same Thing where the Devise is to one and *his Assigns*, and if he die without Issue then living, Remainder over, 'tis void, because 'tis to entail a Term, which the Law will not allow; for in the same Manner as this Remainder is limited to *Thomas*, it may be limited to 20 more, and none of these Remainders can be barr'd by a common Recovery, for they are not *vested*, but are future, and to arise upon Contingencies. This Case is deny'd to be Law, in 1 *Salk.* 225, in *Lamb* and *Archer*'s Case.

But because this is contrary to all former and later Resolutions, I shall give a farther Account of it when I come to *Cotton* and *Heath*'s Case, and shall now proceed to *Lampett*'s Case, which in order of Time was ten Years before the last Case, and should therefore have been placed before it.

If. The Testator possessed of an House and Lands for the Term of 5000 Years, devised the *House, &c.* to his Father *for Life*, whom he made *Executor*, and after his Decease, the Remainder to his Sister *Elizabeth, and the Heirs of her Body.* The Father enter'd, and *Elizabeth* released her Right to him; it was objected, that this Release was void, because *Elizabeth* had no Interest in Possession, and she could have none in Reversion or Remainder, because in Judgment of Law, the Father was entitled to the whole Term; for he having an Estate *for Life* in it, That is more valuable than a Term for Years; but at the most she could have but a bare Contingency, *viz.* so many *Lampett's Case*, 10 Rep. 46.

many Years which ſhould be to come after the Death of her Father, which cannot be releaſed; but adjudged, that an Intereſt which is ſo near as to take Effect after one Life, and which depends not only upon a *neceſſary but common Contingency*, may be releaſed; for 'tis plain, the Intereſt of *Elizabeth* depended upon a *neceſſary* Contingency, becauſe 'tis certain her Father muſt die, and as 'tis certain, ſo 'tis *common*, for Men to die, and the Deviſee hath an immediate Intereſt in Point of Law in ſuch contingent Eſtates, tho' ſuch Intereſt is not to take Effect in Poſſeſſion 'till the Contingency happens, for contingent Titles are Titles, tho' they do not veſt 'till that Time.

Howel *verſus* Augur. W. Jones 217

In the ſame Year there was a Deviſe of a Term for Years to his Wife *for Life*, Remainder to *John and the Heirs of his Body*; the Wife enter'd and *John* dy'd in her Life-time; adjudged, that his Executor had no Title to the Term, becauſe he himſelf had only a contingent Intereſt in ſo much thereof as ſhould be to come after the Death of the Wife, for poſſibly he might have ſurvived the whole Term; and if the Deviſee of ſuch a contingent Intereſt dies before the Contingency happens, it ſhall not go to his Executor.

Price *verſus* Almory, Moor 831.

But within two or three Years afterwards there was a contrary Reſolution, *viz.* the Teſtator poſſeſſed for a Term for Years, deviſed it to his Wife *for Life*, Remainder to *Thomas* and *Lucy*, if they have no Iſſue Male, and if they have *Iſſue Male*, then to be reſerved for their Benefit: They had Iſſue Male, then *Thomas* dy'd; adjudged, that the Remainder to the Iſſue Male was well limited; for by the Deviſe of the Term to the Wife *for Life*, ſhe had not the whole Term, but only if ſhe lived ſo long, and the Poſſibility of ſo much which might remain at her Death, is well limited to *Thomas* and *Lucy*, by Way of executo-

Blandford *verſus* Blandford, Moor 846. Godb. 266. 3 Bulſt. 98. 2 Cro 394. 1 Roll. Rep. 318.

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ry Deviſe, and another Poſſibility after that, *viz.* to their Children if they ſhould have any.

And in the next Year the Caſe of *Price* and *Almory*, was expreſly deny'd to be Law, *viz.* the Teſtator deviſed the Benefit of a Leaſe to his Wife for ſix Years, the Reſidue to *John* if he comes home, and *if he did not come within ſix Years*, then *William* ſhould have it 'till *John* came Home, *William* deviſed the Leaſe to *Heſter* within the Six Years, and made her Executrix, and dy'd; it was objected, that this was a meer Contingency in *William*, and he could not have the Term unleſs he ſurvived the ſix Years, and *John* had not come home within that Time, becauſe nothing veſted in him 'till then, and by Conſequence he could not deviſe it; but adjudged, that there being an expreſs Deviſe for a certain Number of Years, *viz.* for ſix Years, and afterwards for the Reſidue of the Term, 'tis not a Contingency, but an Intereſt after the ſix Years expir'd; and if it ſhould be a contingent Intereſt in *William*, yet 'tis ſuch a Contingency that the Term might have veſted in him, if he had liv'd after the ſix Years, and it ſhall go to his Executrix. 'Tis thus reported by Juſtice *Croke* and my Lord *Rolls* in the firſt Part of his Abridgment, but in the ſecond Part he reports it otherwiſe, *viz.* that *William* could not deviſe this Contingency which he had within the ſix Years, becauſe 'tis not an Intereſt 'till thoſe Years are expir'd.

Sheriffe *verſus* Wrotham, 2 Cro. 509. 1 Roll. Abr. 916. 2 Roll. Abr. 48.

So adjudg'd by Anderſon *and* Periam, 29 Eliz. 3 Leon. 195.

Anno 7. *Car.* 1. The Teſtator poſſeſſed of a *long Leaſe*, deviſed that his Brother *Chriſtopher* ſhould have the *Uſe and Occupation of it for Life*, in like Manner to his Wife *for Life*, and afterwards to the eldeſt Son of *Chriſtopher for Life*, and after ſuch Son dying *without Heir Male*, to any other Son of *Chriſtopher*, one after another in Form aforeſaid; and if *Chriſtopher die without Heir Male* of

Sanders *verſus* Corniſh, Cro. Car. 230. 1 Roll. Abr. 612.

of his Body, that then the Uſe, Profits, and Occupation of the Premiſſes ſhall remain to *Simon* for Life, then to his eldeſt Son for Life, with like Remainder as to the Son of *Chriſtopher*, with other Remainders in the ſame Words; then he made *Chriſtopher* and *Simon* Executors, and dy'd; they enter'd, and agreed to the Legacies; then the Wife dy'd, and *Chriſtopher* dy'd without Iſſue Male, and *Simon* ſurvived, who had Iſſue *Edward* and *John*, and deviſed all his Goods and Chattels to *Edward*, and made him Executor, and dy'd: *Edward* enter'd, and made *Francis* his Executor, and dy'd without Iſſue Male: *Francis* enter'd, and made *George* his Executor, and dy'd: And it was adjudg'd, that *George* had a good Title againſt *John the Second Son of Simon*, for he could have no Title 'till *Chriſtopher* was dead *without Iſſue Male*, which by Intendment is a Limitation of a Perpetuity, and *Edward*, who was the eldeſt Son of *Simon* the ſurviving Executor of *Chriſtopher*, muſt likewiſe *die without Iſſue Male*, which is another Limitation of a Perpetuity before the Remainder to *John* could take Effect, and in the mean Time the Executor of the Deviſor ſhall have it, for it was againſt Law to limit a Term for Years in Remainder, which was not to take Effect 'till after a double Contingency, *viz.* after the Death of *Chriſtopher* and *Edward* his Son, both dying *without Iſſue Male*; beſides, to limit a Term in Remainder after a dying *without Iſſue*, is againſt the Law.

'Tis true, there was no Judgment given in this Caſe, but my Lord *Rolls*, who was Council for the Defendant, tells us, there was a peremptory Rule for Judgment for his Client; but at the Inſtance of the Plaintiff's Council, there was another Day appointed in the following Term to argue it again; but before that Time the Parties agreed, and ſo no Judgment was enter'd: And this

this may be the Reaſon why the Lord Chancellor *Finch* tells us, that *Child* and *Bailie's* Caſe ſtood ſingle, and that there was never the like Judgment given either before or ſince. But with Deference to his Opinion, the like Judgment was given in this Caſe, for there is no ſubſtantial Difference between the Caſes; in *Child* and *Bailie's* Caſe, the Deviſe was to a Man and his *Aſſigns*; in this it was to *Chriſtopher for Life*; but in both Caſes the Remainders were not to take Effect 'till after a *Dying without Iſſue*, for which Reaſon both the Remainders were adjudg'd void. 3 Ch. Rep.

Now, my Lord *Nottingham*, who had ſeen the Record in *Child* and *Bailie's* Caſe, tells us, there was a farther Limitation of that Term, which none of the Reporters mention, and that was to a Daughter, upon the Death of *Thomas without Iſſue*; which was a plain Affectation of a Perpetuity, by multiplying ſo many Contingencies: Beſides, he tells us, that the Will was made *Anno* 10 *Eliz.* that *Dorothy* enjoy'd it 14 Years, and then ſhe aſſign'd her Intereſt to *William*; that he enjoy'd it ſeven Years, and then re-aſſign'd it to *Dorothy*, who held it 15 Years longer, and then ſhe dy'd; and that after her Death, her Aſſigns held it 14 Years; ſo that it was enjoy'd for the Space of 50 Years, without any Claim made by *Thomas*; and in that Time there had been ſeveral Alienations made of it for valuable Conſiderations, and the Term was renew'd for a valuable Fine paid to the Owner of the Inheritance; and therefore the Judges bore hard upon the Title of *Thomas*, who had acquieſc'd ſo long, after ſuch ſucceſſive Tranſmutations of the Poſſeſſion. 3 Ch. Rep.

About four Years afterwards, there was a Deviſe of a Term to his Executors for ſeven Years, Remainder to *Thomas*, *and the Heirs Male of his Body*; and if he *die without Heirs Male*, Remainder Leventharp verſus Aſhby, 1 Roll. Abr. 611.

der over to another, and the *Heirs Male of his Body*; it was adjudged, that this laſt Remainder over was void, becauſe it was not to veſt 'till *Thomas* dy'd *without Iſſue Male*, which is too remote an Expectancy, where the Eſtate is but for Years; and therefore *Thomas* ſhall have the whole and abſolute Term in him, and may diſpoſe of it to whom he pleaſe; and if he die without making any Diſpoſition, it ſhall go to his Executors; for the Clauſe in the Will *viz. if he die without Iſſue Male*, doth not make an Eſtate Tail, or a Remainder in Tail of a Term for Years. becauſe the firſt Limitation was to him and the *Heirs Male of his Body*: But in moſt of the Caſes beforemention'd, the firſt Limitation is *for Life*.

Cotton *verſus* Heath, 1 Roll. Abr. 612.

About three Years afterwards, there happen'd a Caſe, in which, the Lord *Nottingham* tells us, there ſeems to be a contrary Reſolution to that in *Child* and *Bailie*'s Caſe, it was thus:

ſſ. The Teſtator poſſeſſed of a Term for Years, deviſed it to his Wife for 18 Years, then to *C* his eldeſt Son *for Life*, and afterwards to the *eldeſt Iſſue Male of C. for Life*, who had no ſuch Iſſue at that Time, or at the Death of the Teſtator; yet it was adjudged, that if he had left *Iſſue Male*, he ſhould have the Term by Way of executory Deviſe, though the Remainder to the eldeſt Iſſue Male was a contingent Eſtate after a Contingency, and the Reaſon was, becauſe the Contingency might happen after one Life in Being: And this my Lord *Rolls* tells us, was like *Manning*'s Caſe, and my Lord *Nottingham* ſays, 'tis like the Duke of *Norfolk*'s Caſe.

Wood *verſus* Sanders, 1 Ch. Rep. 131.

The next in Order of Time, was *Anno* 21 *Car.* 2. and it was in *Chancery* *ſſ.* It was a Deviſe of *Truſt of a long Leaſe* to the Father for 60 Years, if he *lived ſo long*, the like to the Mother, then to *John* their eldeſt Son, and his Executors, *if he*

ſurvived

ſurvived Father and Mother; and if he dy'd in their Life-time, leaving Iſſue, then to his Iſſue; but if *without Iſſue*, then to *Edward*, and the Heirs of his Body, Remainder over in Tail: *John* dy'd Inteſtate, and without Iſſue, in the Life-time of his Father and Mother; then *Edward* dy'd Inteſtate, and without Iſſue; and his Wife took out Adminiſtration to him, and *Nicholas* took out Adminiſtration to *John*; and adjudged, that the Remainder to *John* being contingent, *viz. If he ſurvived his Father and Mother*, and he dying before the Contingency happen'd, nothing veſted in him, and by Conſequence nothing could go to his Adminiſtrator; but the Remainder over to *Edward* was good; for tho' it was upon the Contingency of his ſurviving *both Father and Mother*, yet ſince that might happen, it being only for *Two Lives* then in Being, it was a ſhort Contingency, and the Law might very well expect its happening; and this we are told is expreſly contrary to *Child* and *Bailie*'s Caſe.

Now in that Caſe it was agreed, That if the Limitation had been to *John*, and if *he dye without Iſſue*, to *Edward*, the Remainder had been void, becauſe 'tis a Limitation after an expreſs Entail, and 'tis too remote to expect a Remainder to veſt after the Contingency of *dying without Iſſue generally*; but where it may veſt in the Courſe of one or two Lives, or upon the *dying without Iſſue, living R. B.* then 'tis well limited.

So 'tis too remote to expect a Remainder of a Term to veſt after a Limitation *to the Heirs Males of his Body*.

As a Deviſe of a Tem to *W.* for 90 Years, if he lived ſo long, Remainder to the *Heirs Males of his Body begotten*, Remainder to *G.* the Brother of *W.* for 90 Years, if he ſhould live ſo long, Remainder to the Heirs Males of his Body, with divers

Grig verſus Hopkins, 1 Sid. 37.

der over to another, and the *Heirs Male of his Body*; it was adjudged, that this laſt Remainder over was void, becauſe it was not to veſt 'till *Thomas* dy'd *without Iſſue Male*, which is too remote an Expectancy, where the Eſtate is but for Years; and therefore *Thomas* ſhall have the whole and abſolute Term in him, and may diſpoſe of it to whom he pleaſe; and if he die without making any Diſpoſition, it ſhall go to his Executors; for the Clauſe in the Will *viz. if he die without Iſſue Male*, doth not make an Eſtate Tail, or a Remainder in Tail of a Term for Years. becauſe the firſt Limitation was to him and the *Heirs Male of his Body*: But in moſt of the Caſes beforemention'd, the firſt Limitation is *for Life*.

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ſurvived

ſurvived Father and Mother; and if he dy'd in their Life-time, leaving Iſſue, then to his Iſſue; but if *without Iſſue*, then to *Edward*, and the Heirs of his Body, Remainder over in Tail: *John* dy'd Inteſtate, and without Iſſue, in the Life-time of his Father and Mother; then *Edward* dy'd Inteſtate, and without Iſſue; and his Wife took out Adminiſtration to him, and *Nicholas* took out Adminiſtration to *John*; and adjudged, that the Remainder to *John* being contingent, *viz. If he ſurvived his Father and Mother*, and he dying before the Contingency happen'd, nothing veſted in him, and by Conſequence nothing could go to his Adminiſtrator; but the Remainder over to *Edward* was good; for tho' it was upon the Contingency of his ſurviving *both Father and Mother*, yet ſince that might happen, it being only for *Two Lives* then in Being, it was a ſhort Contingency, and the Law might very well expect its happening; and this we are told is expreſly contrary to *Child* and *Bailie*'s Caſe.

Now in that Caſe it was agreed, That if the Limitation had been to *John*, and if *he dye without Iſſue*, to *Edward*, the Remainder had been void, becauſe 'tis a Limitation after an expreſs Entail, and 'tis too remote to expect a Remainder to veſt after the Contingency of *dying without Iſſue generally*; but where it may veſt in the Courſe of one or two Lives, or upon the *dying without Iſſue, living R. B.* then 'tis well limited.

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As a Deviſe of a Tem to *W.* for 90 Years, if he lived ſo long, Remainder to the *Heirs Males of his Body begotten*, Remainder to *G.* the Brother of *W.* for 90 Years, if he ſhould live ſo long, Remainder to the Heirs Males of his Body, with divers

Grigverſus Hopkins, 1 Sid. 37.

divers Remainders over, and made *W.* his Executor, and dy'd; adjudged, that theſe Remainders were void, and that the whole Term was in *W.* For in this Caſe, the Word *Heirs* was a Word of Limitation, and not of Purchaſe, becauſe it was of a Term which doth not deſcend to the Heir; and that the Remainder of a Term, after 'tis limited to one, *and to the Heirs of his Body*, is void, becauſe the entire Term is in the firſt Deviſee.

Garret *verſus* Liſter, 1 Lev. 25.

In the ſame Year, the Teſtator being poſſeſſed of a long Term for Years, deviſed it to his Wife *for Life*, Remainder to Truſtees for his Son *for Life*, Remainder in Truſt for the *Heirs of the Body of the Son*, Remainder to the right Heirs of the Son, and made his ſaid Wife Executrix, and dy'd; adjudg'd, that the Wife ſhall have the whole Term as Executrix, and the Remainders are void.

Love *verſus* Windham 1 Mod. 50. Sid. 451. 1 Vent. 79. 1 Lev. 290. * Ventris *and* Levintz, *leave out the Word* Body.

So a Deviſe of a Term to his Wife *for Life*, and then to *Nicholas for Life*; and *if he die without Iſſue of his* * *Body*, then to *Barnaby*: Now here the Limitation being to *Nicholas* for Life (and *not to him and his Iſſue*) and if he die *without Iſſue*, Remainder over; they would have made this an Eſtate for Life in *Nicholas*, and the Remainder good to *Barnaby* by Way of Executory Deviſe, *viz.* upon the Contingency of *Nicholas* dying *without Iſſue*; but adjudged, that the Remainder was void; for the Limitation to *Nicholas*, is the ſame in Effect, as if it had been *to him* and *the Heirs of his Body*, Remainder over, which had certainly been void, becauſe the Law will not preſume that any Term of Years can continue ſo long as a Man may have *Heirs of his Body*.

Lamb *verſus* Archer. 1 Salk. 225.

In a ſpecial Verdict in Ejectment, the Caſe was, The Teſtator being poſſeſſed of a Term for Years, deviſed the ſame to *W. R.* and the Heirs of his Body; and *if he die without Iſſue, living B. B.* then

then to the ſaid *B. B.* and his Heirs; adjudged, this was a good Limitation to *B. B.* becauſe the Contingency was to ariſe within the Compaſs of one Life: And in this Caſe the Court deny'd *Child* and *Bailie*'s Caſe to be Law; which ſee *ante* 295.

It may not be improper in this Place to mention a parallel Caſe by Deed, viz. A Man poſſeſſed of a Term for Years, determinable on three Lives, ſettled it *by Deed*, upon Truſt for himſelf *for Life*, then to his Wife *for Life*, then to *the firſt Son of their two Bodies, and the Heirs of the Body of ſuch firſt Son*, and ſo to ſeveral other Sons in Tail Male, and for want of *ſuch Iſſue*, the Remainder to the Daughter in Tail, *&c.* they had Iſſue only one Daughter; the Wife dy'd; the Huſband marry'd again, and dy'd Inteſtate, and his Widow adminiſter'd; and it was decreed, that ſhe, and not the Daughter, ſhould have the Term; for the Limitation to her in Remainder was void, it tending to a Perpetuity, becauſe it depended upon ſo many remote Contingencies; but a Remainder which might veſt in the firſt Son upon one Contingent, had been good, tho' he was not in Being at the Death of his Father. Burges *verſus* Burges, 1 Mod. 114. 1 Ch. Rep. 229.

Anno 33 *Car.* 2. there was a Deviſe of a Term to his Son *John*, and if he die unmarry'd and *without Iſſue*, then to his Daughters, and their Executors; and if *John* be marry'd and have *no Iſſue*, then (after the Death of his Wife) to his Siſters: *John* dy'd without Iſſue; adjudg'd, that this Remainder of the Term to the Daughters is void, being limited to them upon the Death of their Brother *without Iſſue*; 'tis true, ſuch a Remainder hath prevail'd in Caſe of an *Inheritance*, for ſo is *Pell* and *Brown*'s Caſe, but never yet of a *Term*. Gibbons *verſus* Somers, 3 Lev. 22. Dyer 354.

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Dowſe verſus Earle, 3 Lev. 264.

Sometime afterwards there was a Deviſe of a long Term for Years to the Plaintiff *for Life*, Remainder to his Son, and the *Heirs Males of his Body:* Adjudg'd, that this Remainder is void, becauſe 'tis only *Contingent, viz.* if there ſhould any Part of the Term remain after the Determination of the Eſtate for Life; for in Suppoſition of Law, every Eſtate for Life is of longer Duration than an Eſtate for Years.

D. of Norfolk's Caſe. 3 Ch. Rep.

I ſhall conclude with the noted Caſe of the Duke of Norfolk *in* Chancery, *but it was a Settlement by Deed.*

Ff. He had Iſſue *Thomas, Henry, Charles, Edward, Francis*, and *Bernard*; and by Deed recited a Term of 200 Years, upon ſuch Truſts as ſhould be declar'd of the ſame, by any other Deed; and then by another Deed the Truſt of the Term is limited to *Henry, and the Heirs Males of his Body*, provided, if *Thomas die without Iſſue, living Henry*; ſo that the Earldom of *Arundel* deſcend on *Henry*; then the ſaid Term to remain to *Charles and the Heirs Males of his Body*, with like Remainders in Tail to the reſt: The Contingency did happen, and the Queſtion was, Whether the Remainder of the Term was well limited to *Charles* in Tail? and it was decreed that it was well limited.

Expoſition of Sentences in Wills.

See *poſtea Intention.*

WHERE Sentences in Mens Wills are doubtful, the Expoſition ought to be made according to the *Intent* of the Teſtator; and this my Lord *Coke* calls the *Pole-Star* in thoſe Caſes, to guide the Judges in their Reſolutions.

And ſome have been of Opinion, that ſuch doubtful Sentences are to be interpreted by the

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Law of Nature, rather than by any municipal Law whatſoever; becauſe that is inhærent in all Mankind, when municipal Laws are only to govern particular People and Nations; and therefore it muſt be preſum'd that the *Intention* of the Teſtator was govern'd by the Law of Nature, and not by any of theſe Laws.

But ſuch Interpretations are ſeldom made with us; for tho' by our Law the Intention is more conſider'd than the Words, yet the Words muſt not wholly be neglected, but they muſt be accommodated to his Intention, and that Intention muſt likewiſe be collected out of the Words, and muſt conſiſt with the Law: The Inſtances are as follow, out of the Year-Books, and others.

ſſ. A Deviſe to one for Life, Remainder to his *Heirs Males*, and to the *Heirs Males* of their Bodies; the Tenant for Life had Iſſue a *Daughter*, who had Iſſue a *Son*, he ſhall have the Lands, tho' the Conveyance is wholly by the *Males*, and this is *ratione voluntatis*, by which the Intention of the Teſtator is meant; for the Book tells us 'tis otherwiſe, if it had been by Deed. 11 H. 6. 12.

About 17 Years afterwards, and in the ſame King's Reign, there was a like Judgment. 28 H. 6. Fitz. Deviſe 18.

And *Anno* 30 *H.* 8. the ſame, *viz.* a Deviſe to one, and the *Heirs Males* of his Body, who had Iſſue a *Daughter*, who had Iſſue a Son, and dy'd, the *Son* ſhall have the Land; becauſe it being in a Will, it ſeems to be the Intention of the Teſtator; but if it had been by Deed, the Land ſhould revert to the Doner, rather than go to the *Son* of the *Daughter*.

And the Reaſon is, becauſe Deeds are always expounded ſtrongly againſt the Parties themſelves, but Wills have a more favourable Expoſition; and therefore, if a Man hath *two Houſes*, and ſe-

Ewer *verſus* Heydon, Owen 74. Moor 359. 2 And. 123. Cro. Eliz. 674. Dyer 261.

veral *Lands*, in ſeveral Counties, and deviſes his *Houſe and Lands* in one County, *&c.* and all other his *Lands*, *Meadows*, and *Paſtures*, with their Appurtenances, in the other County; adjudged, that by the Word *Lands*, the *Houſe* in the laſt County did not paſs; for though by a *Grant of Lands*, the *Houſes* which ſtand thereon will paſs; yet in Wills 'tis otherwiſe, for they ſhall be favourably expounded, according to the Intent of the Teſtator; and it ſhall be preſumed, that he did not intend to paſs any more than what he expreſſed in Words, which in this Caſe were his *Lands* in a reſtrained Senſe, for he couples it with Meadows and Paſtures, and ſo excludes the general Acceptation of the Word *Lands*.

This Caſe is reported, as before-mention'd, by *Owen*, *Anderſon*, and *Croke*; but Serjeant *Moor*, who reports the ſame Caſe, tells us, that the *Houſe* paſs'd by the Word *Lands*, for that comprehended both.

21 Jac. Godb. 352. Knight's *Caſe*.

The Teſtator had two Houſes adjoining, *viz.* the *Swan* and the *Red Lion*; the *Swan* was in his own Poſſeſſion, and ſo was *one Room* which belonged to the *Red Lion*; then he made a Leaſe of the *Red Lion* Houſe, and deviſed the *Swan* to *W. R.* adjudged, that the Room in the *Red Lion* Houſe did paſs.

15 Jac. Poph. 131. Gouldwell's *Caſe*.

The Teſtator deviſed Lands to his Wife for Life, Remainder to his Son in Fee, upon Condition, that after the Death of his Mother, he grant to *W. R. a Rent Charge in Fee*; and if his Son die without *Heirs of his Body*, then the Lands to remain to *W. R* in Tail: The Son granted the Rent Charge to *W. R.* and his Heirs, and he granted it over to another, and then the Son dy'd without Iſſue; adjudg'd, that this Grant of the Rent enures from the Teſtator, who had Power

to

to charge the Land in what Manner he pleas'd; and his Intent was, forasmuch as the *Land* is limited in *Tail*, and the Rent in *Fee*, that the Grantee should have Power to dispose the Rent in what Manner he would.

The Testator had three Sons, and devised the Lands in Question to his eldest Son, and the Heirs of his Body, after the Death of the Wife of the Testator; and *if he dy'd, living the Wife, that then the youngest Son, should be his Heir*: He likewise devised other Lands to his second Son, and the Heirs of his Body; and if he dy'd without Issue, that the eldest Son should be his Heir: And he devised other Lands to his youngest Son, and the Heirs of his *Body*; and *if all his Sons die without Heirs of their Bodies, then their Lands shall be to his Nephews*. The eldest Son dy'd in the Lifetime of his Mother, leaving Issue a Son; then the Mother dy'd, and the Uncle, who was the youngest Son of the Testator, enter'd upon his Nephew, who was the Son of his elder Brother: But adjudg'd, that by this Limitation, the Testator did not intend to disinherit any of his own Grandchildren, because by a subsequent Clause he appoints, that if all his Sons die without Issue, then his Nephews shall have the Lands; so that his Intention must be, that whilst the eldest Son hath any Issue of his Body, the youngest Son shall never have it. Spalding *versus* Spalding, Paſ. 6. Car. Cro. Car. 185.

So where the Testator hath been *mistaken* in the Manner of conveying his Lands, yet such Mistake may be rectify'd by his *Intention*.

Ss. † The Devise was, That *A.* and *B. his Feoffees* should stand seised to and for *John Collins* for Life. Remainder over, when in Truth he had no *Feoffees*, * yet this is a good Devise to him by reason of his Intention. This Case is reported by *Rolls*, by the Name of *Burffeild* and *Knarsborough*, thus: † Burffeild *versus* Byboro, Poph. 188. * *See* 1 Leon. 313. Hob. 32. 1 Lutw. 735.

Ff. A Deviſe that *R. B.* and *W. N.* and their Heirs, ſhould ſtand ſeiſed to the Uſe of *J. O. &c.* now, tho' the aforeſaid Perſons had nothing in the Lands, yet it amounts to a Deviſe thereof to *J. O.* becauſe the Intention is apparent, that he ſhould have it.

Wright *verſus* Wyvel, 2 Vent. 56. 3 Lev. 259.

But *Anno* 1 *Will'i*, there ſeems to be a contrary Judgment. *Ff.* The Deviſe was thus: *As for my Perſonal Eſtate, I bequeath to my Wife,* 600 *l. to be paid to* William Weddall, *and 'tis for the full Payment of the Lands I purchaſed of him, and is already eſtated in Part of a Jointure to my Wife for her Life, at* 67 *l.* per Ann. *the Lands in* Wiſkow, &c. 63 *l.* per Ann. *in all* 130 *l.* per Ann. *which being alſo eſtated upon my ſaid Wife, it is in full for her Jointure,* when there was not any Part of thoſe Lands ſettled on his Wife for Jointure; and the Queſtion was, Whether ſhe or the Heir at Law ſhall have thoſe Lands; and adjudged, that the Heir ſhall have them; for it appears by the Will, that the Teſtator did not intend them for her, becauſe he took Notice, that ſhe was *eſtated in them before the making the Will,* therefore it could not be an implicit Deviſe to her by the Will; for in ſuch Caſes there is no Reference to any Act which ſhould have convey'd the Land to the Deviſee before; but Juſtice *Powell* was of another Opinion, *viz.* that it appeared the Teſtator did intend by theſe Words, that his Wife ſhould have the Lands, tho' he was miſtaken in the Manner, therefore ſhe ſhall have them by the Way ſhe may take, *viz.* by the Will, rather than the Intent of the Teſtator ſhould be fruſtrated. *Moor* 31, denied to be Law, *Poſt.* 312.

2 Vent. 363

Deviſe to *W.* in Fee, in Truſt for *K.* and the Heirs of her Body, and if ſhe die without Iſſue, then to *Jane* for Life; and if *K.* die without Iſſue *and Jane be then dead,* then, *and not otherwiſe,* to

R. B.

R. B. and his Heirs. *K.* dy'd without Iſſue, but *Jane* was living; and upon a Bill brought by *R. B.* againſt *W.* and the Heir at Law, to have the Truſt executed, it was decreed for him, tho' *Jane* was living when *K.* dy'd; for the Words if *Jane be then deceaſed*, ſeem to be put in to expreſs the Intention of the Teſtator, that *Jane* ſhould be certain to have it for Life, and alſo to ſhew when *R. B.* ſhall have it in Poſſeſſion.

By a Deviſe of a Mannor, the Rents and Services paſs, which ſometimes are divided in a Will; as where the Teſtator deviſed his Demeſne Lands to his Wife for Life, and the Serviſes *for* 18 *Years*, and the *whole Mannor* to another *after the Death of his Wife*; adjudg'd, that the Deviſee ſhall have nothing in the Mannor 'till after the Death of the Wife, tho' the Services were given to her only for 18 Years; and that after the Expiration thereof, the Heir ſhall have them during the Life of the Wife; and the Reaſon was, becauſe by the expreſs Words of the Will, the Deviſee was to have nothing 'till after the Death of the Wife: But if it had been, that he ſhould have the *whole Mannor* after the 18 Years, and after the Death of the Wife, there it ſhould have been taken diſtributively, *viz.* that he ſhould have the Demeſne-Lands after the Death of the Wife, and the Services after 18 Years. Inchley *verſus* Robinſon, 2 Leon. 41. 3 Leon. 165. Moor 7.

So where the Teſtator was ſeiſed in Fee of ſome Lands in Poſſeſſion, and of the Reverſion in Fee of other Lands, expectant upon the Death of the Tenant for Life, and deviſed that his Wife ſhould have the Uſe of his Demeſne-Lands *for one Year after his Death*, and then he deviſed both his *Demeſne Lands and the Reverſion* to *Thomas Kemp* for Life, to hold from and after the Expiration of one Year, *next after his Deceaſe, and the Deceaſe of the Tenant for Life.* The Queſtion was, Whether he ſhould have the Demeſne-Lands a Year next after Cook *verſus* Gerard, 1 Sand. 180. 1 Lev. 212.

ter the Deceaſe of the Teſtator, or ſhould ſtay 'till a Year next after the Death of the Tenant for Life; and it was adjudg'd, that the Clauſe *next after his Deceaſe and the Deceaſe of the Tenant for Life*, ſhall be taken diſtributively *reddendo ſingula ſingulis*; that is, he ſhall have the Demeſne-Lands a Year next after the Death of the Teſtator, and the Reverſionary Lands a Year next after the Death of the Tenant for Life.

As in the Inſtances before-mention'd, ſome Sentences are to be taken diſtributive, ſo in other Caſes, theſe Sentences which are divided in a Will, ſhall be joined, the better to explain the Intention of the Teſtator.

Oſborne verſus Wickend, 2 Sand. 197

Sr. John Swayſland ſeiſed in Fee of Lands in *Hartfield*, deviſed 12 *l. per Ann.* to his Siſter *Anne* during her Life, and whilſt ſhe remain'd ſole, to be iſſuing out of his ſaid Lands, *and if ſhe ſhould marry*, that then his Executor ſhould *pay her* 100 *l.* and the *Rent ſhould ceaſe*, and return to his Executor: She marry'd, and the 100 *l.* was not paid, and ſhe diſtrein'd for all the Rent Arrear after her Marriage: And the Queſtion was, Whether it ſhould actually ceaſe *by her Marriage*, or not 'till the 100 *l.* be paid. Juſtice *Twiſden* was of Opinion, that the Rent ceas'd upon her Marriage; for tho' the Payment of the 100 *l.* was placed between the Marriage and the ceaſing of the Rent, yet the Senſe is, that it ſhall ceaſe upon the Marriage; for if ſhe had marry'd in the Life-time of the Teſtator, ſhe ſhould not have the Rent, though the 100 *l.* had not been paid; but yet ſhe ſhould have the 100 *l* as a Legacy, and recover it in the Spiritual Court.

But two other Judges were of a contrary Opinion, That the Payment of the Rent, and the ceaſing it, ſhould be joyn'd, and ought not to be ſeparated; for if it ſhould, then *Anne* might have nothing, becauſe if the Rent ſhould ceaſe upon the

the Marriage, it might happen that the Executor might have no Aſſets, and then he would have the Eſtate, and pay nothing for it. And as to the Objection, that ſhe ſhould not have the Rent if ſhe had marry'd in the Life-time of the Teſtator, 'tis very true; but 'tis becauſe the Rent was never veſted in her; for that would have been prevented by her Marriage, which was her own Act, and it was likewiſe her Folly to deſtroy her own Security. But here the Rent was veſted in her, and 'tis not reaſonable it ſhould be diveſted without an actual Payment of the 100 *l.*

Stephen Norton being ſeiſed in Fee, deviſed his Lands to a *Daughter of his Couſin Nicholas Amhurſt, who ſhall marry with a Norton within* 15 *Years:* At that Time *Nicholas Amhurſt* had three Daughters: The Plaintiff marry'd the Heir at Law of the Teſtator, and one *Stephen Norton* marry'd the eldeſt Daughter of *Nicholas Amhurſt*, and in Ejectment the ſole Queſtion was, Whether the Heir at Law, or the Deviſee, had the better Title? It was objected, that the Will was void for the Uncertainty of which of the Daughters ſhould take, becauſe more than one of the Daughters might marry with a *Norton:* But adjudg'd, that the Words of the Will fix it to one Daughter and no more, ſo that there is a Certainty in the Perſon, tho' not in the Event. Bates *verſus* Norton, Raim. 82.

In a ſpecial Verdict in Ejectment the Caſe was, The Father being ſeiſed in Fee, did, in Conſideration of the Marriage of his Son, covenant to levy a Fine to certain Uſes in the Deed, but no Fine was levy'd: Afterwards by his laſt Will reciting this Deed, he deviſed and confirm'd all Eſtates given and *granted* to his Son in Marriage according to the Deed: Adjudg'd, that the Will referred to the Deed, and paſſed ſuch Lands as were intended to be convey'd by the Deed and Fine; Milford *verſus* Smith, 1 Salk. 225. *See* Cro. Eliz. 68. 2 Cro. 148.

becauſe the Word *Grant* in a Will ſhall not be taken ſtrictly, but in the largeſt Senſe, for any Manner of Agreement.

As to Grammatical Expoſitions, in ſome Caſes the Preter tenſe ſhall be taken for the Preſent-tenſe, and in ſome Caſes an ambiguous Word ſhall not refer ad proximum antecedens.

Moor 31. *ff.* The Deviſe was thus, *viz.* I *have* made a Leaſe for 21 Years to *R. B.* paying 10*s* this was held to be a good Leaſe for 21 Years, though the Word I *have* is in the *Preter-tenſe*; 'tis true, this Caſe was deny'd to be Law in *Wright* and *Wynell*'s Caſe, becauſe 'tis only ſaid *fuit Tenus* to be a good Leaſe.

Gamage's *Caſe*, 1 Vent. 368. So where one *Gamage* deviſed his Lands in *H.* to his Wife for Life, alſo his Lands in *B.* to his Wife for Life, and alſo his Lands which he purchas'd of *J. O.* to his Wife for Life, and after her Deceaſe he gave the ſaid *Lands* to his Son and his Heirs. The Queſtion was, Whether *all* the Lands, or whether only thoſe laſt mention'd ſhall paſs to the Son? There was no Judgment given, but it was argu'd, that the Word *ſaid* ſhall not refer *ad proximum antecedens*, but to *all Lands*, and that *indefinitum æquipolet univerſali.*

Sir Tho. Littleton's *Caſe*, 2 Vent. 351. But where a Man hath Lands in Fee, and other Lands mortgaged to him in Fee, in ſuch Caſe by a Deviſe of *all his Lands* the Mortgage paſſeth: So if he hath a *Truſt* of a Mortgage of Lands in *H.* and other Lands in the ſame Place, by a Deviſe of *all his Lands* in *H.* the Truſt will paſs: But if the Teſtator deviſe Lands in *H. B.* and *C.* to *W. N.* and all his Lands *elſewhere*, and he had a Mortgage of Lands of a greater Value than the Land in *H. B.* and *C.* but not lying in either of thoſe Pariſhes, that Mortgage will not paſs; for the Teſtator can never be intended to mean Lands

Lands of ſo great a Value by the Word *elſewhere*, which is uſually inſerted *currente calamo*.

As to Perſonal Legacies, I find theſe Expoſitions following:

The Teſtator had Goods to the Value of 100 *l.* and ow'd 20 *l.* and he deviſed a *Moiety* of all his Goods to his Wife and his Executors, *equally to be divided* amongſt them; the Executors paid the 20 *l.* yet the Wife ſhall have her full Moiety, *viz.* 50 *l.* becauſe the Executors who were to pay the Debt had Aſſets enough beſides. Gold. 149.

Where the Teſtator and the Legatee were both in *London*, and he deviſed, that his Executor ſhould have the Horſes he had in *Dublin* the 3d Day after his Deceaſe, and then dy'd in *London*; though the Diſtance of Place made it impoſſible to perform that Part of the Will, yet becauſe he might have liv'd long enough after the making the Will, to have the Horſes brought from *Dublin* to *London*, in order to be deliver'd according to the Time limited, the Deviſe is good.

If the Teſtator deviſed 50 Quarter of Corn *to be paid* out of the Corn which ſhall grow on his Land in the next Year, or 100 Lambs *to be taken* out of his Flock next Year, and he hath neither ſo many Quarters of Corn or Lambs in that Year; yet the Deviſe muſt be perform'd by the Executor if he hath Aſſets; becauſe the Legacy is abſolute, and the Demonſtration is how it ſhall be paid. Perk Sect. 511, 525.

So if he deviſe an Ox or Cow, and hath no ſuch, the Executor muſt perform it if he hath Aſſets.

But if he Deviſe the Corn *which ſhall grow on his Land* the next Year, or the Lambs his Sheep ſhall bring, and there happens to be none the next Year, the Legacy is void; for it was not certain or abſolute; it only conſiſted in a Poſſibility

bility, and was reſtrain'd to the Growth of the Year.

A Deviſe to his Wife that which he had with her in Marriage, and he had nothing with her, the Legacy is void; but if he had deviſed a *certain Sum* to her which he had with her in Marriage, though he had nothing with her, 'tis good for that Sum, becauſe the Law rather conſiders the Certainty of the Thing expreſs'd in *Terminis*, than any falſe Demonſtration of it.

Fee-Simple, Deviſe thereof.

Abraham verſus Trugg, Cro. Eliz. 478. Moor 424.

THE Word *Heirs* imports a Fee-Simple as well in Deeds as Wills, and ſo doth the Word *Heirs Males*; as for Inſtance, the Teſtator deviſed Lands to *R. B.* and *his Heirs Males begotten*, this is an Eſtate in Fee, and not an Eſtate Tail, for Want of the Word *Body* from whom this Heir Male ſhould come; but if it had been *to the Heirs Males of R. B.* it had been an Eſtate Tail.

Lit. Sect. 31.

This is the expreſs Text of *Littleton*; but my Lord *Coke* in his Comment upon it, tells us, That in Wills the Law ſhall ſupply the Words *of his Body*.

Shailand verſus Baker, Cro. Eliz. 744.

The Father being ſeiz'd in Fee, and having three Sons, *viz. William* by one Venter, and *James* and *Francis* and a Daughter by another Venter, deviſed his Lands to his Sons *James* and *Francis*, without limiting what Eſtate they ſhould have; then follow theſe Words, *viz.* if either of them *or their Heirs* ſell the ſame, then the Deviſe ſhall be void, and it ſhall return to the *whole Heirs* again; and in another Part of the Will, he appointed the two youngeſt Sons *to pay* to the eldeſt and *his Heirs* 3 *l.* The Father died, the two youngeſt Sons died without Iſſue; adjudg'd, That they had a Fee-Simple: For the Intent of the Teſtator

Teſtator ſeems to be ſo by theſe Words, if they or *their Heirs* alien, and reſerving a Rent to the eldeſt Son and *his Heirs*; and there are no Words of Entail, unleſs thoſe (*viz.*) that it ſhall return to the *whole Heirs*, which is void, becauſe 'tis limited after an abſolute Fee.

In a ſpecial Verdict in Ejectment the Caſe was, the Teſtator being ſeiz'd in Fee, deviſed his Lands to his Daughter for Life, Remainder *to W. R. and his Heirs*, and *for Want of ſuch Heirs*, Remainder to the right Heirs of *T. P.* It was adjudg'd, That this Limitation to *W. R.* and his Heirs made a Fee-Simple, and not an Eſtate Tail, becauſe the legal Senſe of theſe Words ſhall be taken, where it doth not appear from a plain and neceſſary Implication that the Teſtator did mean otherwiſe; therefore in this Caſe the *Want of ſuch Heirs* may be intended Heirs general, and not Heirs of his Body; for there is nothing that ſhews he intended otherwiſe, and by Conſequence the Remainder to the right Heirs of *T. P.* is void in its original Creation.

Humble *verſus* Jones, 1 Salk. 233

So a Deviſe to *B.* for Life, and after his Deceaſe to the *Heir of his Body* for ever. The Word *Heir* in the ſingular Number is *nomen collectivum*, and 'tis the ſame with *Heirs*, and ſo *B.* hath a Fee-Simple executed, and his Heirs ſhall take by Deſcent, and not by Purchaſe.

Pawſley *verſus* Lowther, 1 Roll. Abr. 253. Stiles 249, 273. Bawſy *verſus* Lowdall.

A Deviſe *Sanguini ſuo, Succeſſoribus ſuis* ‖ *imperpetuum & propinquo Sanguini*, theſe and ſuch like make a Fee.

‖ Keilw. 43. *b.*

For the Law allows many Words and Expreſſions in Wills to paſs an Eſtate in Fee-Simple, which will not paſs by the ſame Words in a Deed.

Co. Litt. 9. 22 Ed. 3. 13 Fitz. Deviſe 20.

As by the Words, { I. *Paying.* II. *Purchaſe.*

By

By these Expressions,
1. *A Devise of his whole Estate,*
2. *Of all his Inheritance.*
3. *To allow Meat, &c.*
4. *To dispose at his Discretion, or to give and sell at Pleasure.*
5. *A Devise of the whole Remainder.*

Walker versus Collier, Cro. Eliz. 378. 6 Rep. 16. a. † 2 Cro. 874.

(1.) *As to the Word paying, &c.* this makes a Fee-Simple; but if it had been paying so much † *out of the Profits* of the Land, it had been only an Estate for Life, because the Devisee could have no Manner of Loss; so that if the Land is 5 *l. per Ann.* and it is devised to one, *paying* 50 *s. per Ann.* 'tis only an Estate for Life, for the same Reason: But where there is a Probability that a Man may die after the Payment of the Sum devis'd to be paid, and before Satisfaction can be made to him, there he shall have an Estate in Fee, because the Law intends the Devise was for his Benefit, and not to his Prejudice.

Slide *versus* Thompson, Hill. 9 Jac. 2 Cro. 374.

Devise of Lands to *W. R.* for Life, the Remainder to *B. B.* and his Heirs, paying 10 *l.* out of *the Issues and Profits* of the Land. He in Remainder died, leaving his Heir within Age, and in the Life-time of the Tenant for Life; it was found by Office, that the Lands were held of the King *in Capite*, and thereupon he seiz'd it during the Infancy of the Heir of the Testator; afterwards when he came of Age he enter'd; and adjudg'd lawful; for the Money being to be paid out of the Profits of the Land, it must be *intended* when he shall receive them, but hitherto the King had receiv'd them.

29 H. 8. Co. Litt. 9 *b.* 1 Roll. Abr. 834.

The Year-Book 29 *H.* 8. tells us, That a Devise to one *paying* 100 *l.* to another, this makes a Fee; and if he doth not pay it in his Life-time,

time, yet if his Executor or Heir pay it, 'tis ſufficient.

So a Deviſe of his Lands to his Wife for Life, Remainder to his eldeſt Son, *paying* to his Brothers and Siſters 40*s.* though there is no Eſtate devis'd to the eldeſt Son, and though the Value of 40*s.* is but ſmall, yet it is a Conſideration, and makes an Eſtate in Fee, and the Word *paying* doth not make a *Condition*, but a *Limitation*; for if it ſhould be a Condition, then if the Son did not *pay* the Money, he himſelf would take Advantage of it; for it deſcends to him, and ſo the Money would never be paid: But 'tis a Limitation of his Eſtate, and in Default of Payment it ſhall go to the next in Remainder. Weſtlock *verſus* Hammond Cro. Eliz. 204. 3 Rep. 20. *See* Newys *verſus* Scholaſtica, 8 F. Plow. Com. 412.

So a Deviſe to his Son after the Death of his Mother, and if his Daughter ſurvive the Son and his Heirs, then to her for Life, and after her Death to *Roger* and *John*, *paying* yearly to the Company of *Merchant-Taylors* 6*l.* 16*s.* and if they or their *Succeſſors* deny Payment, then the Company to enter. Adjudg'd, This was an Eſtate in Fee in *Roger* and *John* by Reaſon of the Word *paying*; and it is not material of what yearly Value the Land is above the Sum to be paid, becauſe the Payment of any Money makes an Eſtate in Fee in the Deviſee, and here Succeſſors ſhall be taken for Heirs. Webb *verſus* Herring, Moor 852. 2 Cro. 415. Bridgm. 84. 3 Hall. 193.

So a Deviſe of Land to his Son *paying* 3*l.* *per Annum* to his other Son, adjudg'd a Fee, becauſe the Charge to the Brother might ſurvive and continue after the Death of the Deviſee; and ſo 'tis in all Caſes where the Word paying is *Collateral*, and 'tis not ſaid out of the *Profits of the Land*. Spicer *verſus* Spicer, Godb 280. 2 Cro. 327. 2 Roll. Rep. 80.

So a Deviſe to his eldeſt Son *for Life*, and afterwards to his youngeſt Son, he *paying* to his Siſters 10*l.* apiece, except the eldeſt Son purchaſe Lands Green *verſus* Dewell, 2 Cro 599.

Lands of as good Value for the youngeſt, and then the eldeſt to have the Lands ſo devis'd to the youngeſt *to ſell at his Will and Pleaſure*; adjudg'd, this was a Fee in the youngeſt Son.

Poſt. 319.

So a Deviſe of his Houſes to his Son *Robert*, upon Condition that he pay unto his Siſters 5 *l. per Annum* during their Lives; adjudg'd, this made a Fee-Simple.

Reed *verſus* Hatton, 2 Mod. 25.

And in ſome Caſes the Word *paying ſubauditur*, in order to make an Eſtate in Fee, as a Deviſe to his Wife for Life, and after his Deceaſe, that *Robert* his eldeſt Son ſhould have it *ten Pounds under the Price it coſt*; and if he die without Iſſue of his Body lawfully to be begotten, then to *Richard* in like Manner. The Court inclin'd, that the Words *ten Pounds under the Price it coſt*, ſignify that he ſhould have it *paying* ten Pounds under that Price, which made a Fee-Simple determinable upon his Nonpayment, though the latter Words make an Eſtate Tail.

Bullen's *Caſe*, Moor 361. Goldſ. 134.

Now though the Word *paying* generally makes a Fee, as it appears plainly in the Caſes before mention'd; yet where the Eſtate is limited over, 'tis otherwiſe.

As a Deviſe of ſeveral Lands to his two Sons, ſeverally *paying* to each of his Daughters 10 *l.* apiece, as ſoon as his ſaid Sons ſhall enter into their Parts, provided that if either of his Sons marry and *have Iſſue*, and die before he enters into this Part, then that Part ſhall remain to the Heirs of his Body, and not to his other Brother. Here is a farther Limitation, *viz.* That after the Death of one, it ſhall remain to the other; which ſhews that the Teſtator's Intent was, that he ſhould have it only for Life, notwithſtanding that Limitation of *Payment* of 10 *l.* apiece to the Daughters, for that ſhall be intended to be made to them for the Eſtate deviſed to the Son.

Bacon *verſus* Hill, Cro. Eliz. 497. Moor 464.

Deviſe

Deviſe to his Son and Heir, and if he die before 21, and *without Iſſue of his Body then living*, Remainder over; he out-liv'd 21 Years, and then ſold the Land and died; and it was adjudg'd, That the Sale was good, for he had a Fee-Simple immediately, and the Eſtate Tail was to ariſe upon a Contingency ſubſequent to the Eſtate in Fee, *viz.* upon *his dying before* 21, *and without Iſſue, living at his Death*, which could then never happen, becauſe he had ſurviv'd 21 Years. Colleaſon *verſus* Wright, 1 Sid. 148. *See* Glache's *Caſe*, 280. *and* Chadock *and* Cowley's *Caſe*, 283.

(2.) And as a Fee-Simple is made by the Word *paying*, ſo it may be made by the Word *Purchaſe*, as where the Teſtator had Iſſue *William*, who had Iſſue *Robert* and *Thomas*, and being ſeiz'd of Lands in *Clay*, he deviſed them to *William for Life*, then to remain to *Thomas*, except *William purchaſe* another Houſe and Lands, and ſo good in ‖ Value as the Houſe and Lands in *Clay* for his Son *Thomas*, and then *William ſhall ſell thoſe in* Clay *as his own*, and *Thomas* ſhall pay to his Siſters 10*l.* a Year; adjudg'd, that *William* had a Fee-Simple; for though by the firſt Words of the Will he had only an Eſtate for Life, yet the Word *Purchaſe* imports an abſolute *Purchaſe in Fee*, (tho' a *Purchaſe* may be alſo *for Life*) and the Words ſo good in Value, muſt be intended in the Price, and not in the yearly Value which muſt be a Fee-Simple, for otherwiſe he could not ſell *Clay as his own*. Green *verſus* Armſted, Hob. 65. 1 Roll. Abr. 833. 834. ‖ *'Tis not ſaid yearly Value.*

(1.) *A Fee-Simple is likewiſe made by a Deviſe of his whole Eſtate*, as where the Teſtator deviſed to his Wife his *whole Eſtate*, *paying Debts and Legacies*; adjudg'd, that ſhe had a Fee-Simple, for the Words *whole Eſtate* ſhall extend to the *Eſtate* in his Land, and in this Caſe the *Perſonal Eſtate* was not ſufficient to pay the Debts and Legacies, therefore the Land muſt be deviſed. Johnſon *verſus* Kerman, 1 Roll. Abr. 834. Stiles 293, 282. *See* North *verſus* Crompton, poſt.

'Tis

Reevet verſus Winnington, 3 Mod. 45.

'Tis true, where a Man hath a Real and Perſonal Eſtate, and deviſes *all his Eſtate*, it doth not appear what *Eſtate* he intended; therefore it ſhall comprehend the whole, in which he hath either Intereſt or Property.

Tirrill verſus Page, 1 Ch. Rep. 262.

So it was decreed in *Chancery* by my Lord *Nottingham*, *viz.* the Teſtator deviſed ſeveral Legacies in Money, and all the reſt of his Money, Goods, and Chattels, *and other Eſtate* whatſoever, he deviſed to *R. B.* whom he made Executor. It was decreed, That he having Lands a Fee-Simple paſſed by theſe Words.

Wilſon verſus Robinſon, 2 Lev. 91. 1 Mod. 100

The Teſtator being ſeized in Fee of Lands in the North, call'd *Tenant-Right Lands*, (which are in the Nature of Copyhold; for upon every Death or Alienation the next Tenant is to be admitted, but they paſs by Deed without Livery) he deviſed to his Couſin *W. R. all his Tenant Right Eſtate* in *Brigeſend*, *&c.* with all that he and his Father took of *R. H.* of his Majeſty's Land, and of the *Marquis's* Fee, with *all* his Land in *Beckſide*. It was objected, That by the Words *all his Tenant-Right Eſtate*, only an Eſtate for Life paſſed, becauſe thoſe were not Words of *Limitation* of the Eſtate, but a Deſcription of the Nature and Quality of the Land, and that all the ſubſequent Words make but an Eſtate for Life in the *Marquis's Fee*, and the *Beckſide* Lands, and being all join'd in one Sentence paſs no greater Eſtate; but adjudg'd, that the Deviſee had a Fee-Simple, for the Word *Eſtate* comprehends all his Intereſt, and leaveth nothing in himſelf.

1 Roll. Abr. 844. Moor 153.

Carter verſus Horner, Shore 348. 4 Mod. 89.

So where the Teſtator ſeiz'd of Copyhold and Freehold Lands deviſed all the *reſt of his Eſtate*, whether Freehold or Copyhold, to his Wife and Children equally to be divided amongſt them; it was inſiſted, That the Word *Eſtate* muſt in legal Signification

Signification be the *Intereſt* he had in the Land, and ſo paſs a Fee.

(2.) *An Eſtate in Fee likewiſe paſſes by a Deviſe of all his Inheritance*, as where the Teſtator deviſed to *Agnes* his Lands for eight Years, *Item*, I give to *Agnes* my Daughter all my *Lands of Inheritance*, if the Law will permit; adjudg'd, That ſhe had a Fee-Simple. Whitlock *verſus* Harding, Moor 873. Godb. 207. Hob. 2. 1 Roll. Abr. 835.

So a Deviſe of his ‖ *Inheritances* to one after the Death of his Mother, and if he die before he come of Age, then to the *Right Heirs* of the Teſtator. It was the Opinion of the Chief Juſtice *Saunders*, that this was an Eſtate in Fee; for if the Teſtator had intended him only an Eſtate for Life, it had been to no Purpoſe to have limited it to his own right Heirs, for the Law would have done that without any ſuch Limitation. ‖ 2 Sand. 388.

In a ſpecial Verdict in Ejectment the Caſe was, The Teſtator being ſeis'd in Fee deviſed an *Annuity* to *W. R.* in Fee, *Item*, I deviſe *my Mannor of* Bucknall *to T. S.* and his Heirs; *Item*, I deviſe *all my Lands, Tenements, and Hereditaments to the* ſaid *T. S.* but did not ſay *for what Eſtate*; *Item*, I give all my Goods and Chattels, Money and Debts, *and whatever elſe I have not before diſpoſed*, to the ſaid *T. S. be paying my Debts and Legacies.* The Queſtion was, what Eſtate *T. S.* had in the *Lands, Tenements, and Hereditaments*; it was inſiſted, that by the Word *Item* the Sentences were conjoin'd; and that the Meaning of the Teſtator was carry'd on to give the like Eſtate in the *Lands, Tenements, and Hereditaments*, as he had done in the *Mannor of Bucknall* before, and that by the Word *Hereditaments* he intended to give an Inheritance in Fee-Simple; for ſo it was adjudg'd in the Caſe of the Regicides, whoſe Lands, Tenements, and *Hereditaments* were given to the Crown by the Statute

12 *Car.* 2. That by the Word *Hereditaments* an Eſtate Tail of one of them did paſs. It was adjudg'd in the principal Caſe, that a Fee-Simple did paſs, but not for the Reaſons before mention'd; for the Word *Item* doth never join Sentences; but in Wills is always introductive of new Matter: That the Word *Hereditaments* in this Will cannot denote the Meaſure or Quantity of Eſtate, becauſe it hath another proper Meaning; for it may extend to Annuities and to Advowſons in Groſs, which are not comprehended by the Words *Lands or Tenements*, and the Reaſon why in the Caſe of the *Regicides* the Word *Hereditament* was adjudg'd to extend to an *Inheritance in Tail*, was not *ex vi Termini*; but becauſe a Forfeiture of their Hereditaments, was not only of their Lands, but of the Eſtate which they had in them; now in the principal Caſe theſe Words, *viz. whatever elſe I have not diſpoſed* carry a *Fee-Simple*, they can have no Effect on his perſonal Eſtate, becauſe that was devis'd before, therefore they muſt extend to that which was not diſpos'd, and that was the Fee-Simple; and the rather, becauſe of the ſubſequent Words *paying my Debts, &c.*

2 Lev. 169, 196.

Hopewell *verſus* Ackland, 1 Salk. 239. *See* Allen 28. 2 Vent. Willow's *Caſe* 285.

The Teſtator being ſeiz'd in Fee, deviſed, *&c. to his Wife for Life*, and if ſhe had a Son, and ſhe ſhould cauſe him to be call'd by the *Chriſtian* and *Surname of the Teſtator*, which was *Sampſon Shelton*, then he deviſed *his Inheritances* to ſuch Son, after his Mother's Death; and if he die before 21 Years old, then to the right Heirs of the Teſtator, who dy'd, and his Widow marry'd one *Broughton*; then the *Brother and Heir of the Teſtator convey'd the Reverſion* by Bargain and Sale, and alſo by a Fine levy'd to the ſaid *Broughton and his Wife* and their Heirs; afterwards a Son was born, and *chriſten'd by the Name of Sampſon Shelton*; and afterwards *Broughton* and his Wife by Bargain

and

and Sale enroll'd, and alſo by a *Fine* levy'd by them, convey'd the Lands to one *Weſton* and his Heirs; adjudg'd, That the Brother and Heir of the Teſtator, by conveying the *Reverſion to the particular Eſtate for Life* which the Wife had by the Will, had deſtroy'd this contingent Remainder to the Son; ſo that it was not debated what Eſtate the Son would have, if ſuch Conveyance had not been made; but the Chief Juſtice *Saunders* tells us, he would have an *Eſtate in Fee*, becauſe the Teſtator had deviſed the Lands to his own right Heirs, if this Son ſhould die before he was 21 Years old; now if he had not intended a Fee-Simple for this Son, the Deviſe to his own right Heirs had been impertinent, becauſe it would have come to them without any ſuch Deviſe.

Puresoy *verſus* Rogers, 2 Sand. 388.

In a ſpecial Verdict in Ejectment the Caſe was, The Huſband being ſeis'd in Fee of an Houſe call'd *The Bell Tavern*, ſettled the ſame to the Uſe of himſelf for Life, Remainder to his *Wife for Life*, Remainder to his Son in Tail, Remainder to his Wife in Fee; the Huſband died, and the Wife being thus entitled to the *Bell Tavern*, and having, other Leaſehold Eſtates, deviſed *All her Right, Title, and Intereſt In* whatever ſhe held by Leaſe, *And alſo* the *Bell Tavern*, to *John Billingſley*, (but did not ſay for what Eſtate) he being the Son and Heir of the Huſband, and alſo the Remainder Man in Tail of the *Bell Tavern*, but was not the Heir of the Wife. The Queſtion was, What Eſtate he had by this Will? And three Judges againſt *Holt*, *Chief Juſtice*, held, that he had an *Eſtate in Fee*, becauſe 'tis but one entire Sentence, coupled by the Words *And alſo*, and govern'd by one Verb; beſides the Prepoſition *In* may properly be carry'd to the *Bell Tavern*; and this would be very plain by a little Tranſpoſition of the Words, *viz.* I give my Term of Years, and all

the Eſtate, Right and Title I have therein, *and alſo in the Bell Tavern*; and this is an honeſt Conſtruction, becauſe it brings back the Reverſion in Fee to the right Heir of the Huſband who created it; but *Holt, Chief Juſtice*, held, That the Intention of the Teſtatrix muſt be collected out of the Words of the Will, and not out of any Circumſtances of the Eſtate; and as to the Honeſty of the Conſtruction, the Wife might bring a great Portion, and therefore 'tis as honeſt to conſtrue the Will in Favour of her Heir, as in Favour of the right Heir of her Huſband: That the Subject Matter of all her Right, Title, and Intereſt, terminates by the Propoſition *In* in her Leaſehold Eſtate: That the Words of a Will are never to be transpos'd where they are ſenſible in themſelves, becauſe to tranſpoſe Words which are intelligible without it, is to alter the Senſe of the Will; 'tis true, this is done where they are Nonſenſe, that they may have ſome Meaning, therefore *Billingſley* hath but an Eſtate for Life in the *Bell Tavern*.

Cole *verſus* Rawlinſon 1 Salk. 234. Dyer 19. Hob. 2. Moor 52, 873.

In a ſpecial Verdict in Ejectment the Caſe was, The *Duke of Bolton* deviſed to his Son-in-Law *John Earl of Bridgwater*, his Executors, and Aſſigns, all his Mines, together with all his Plate, Jewels, *and all other his Eſtate Real and Perſonal*, not otherwiſe diſpos'd by his Will, to be given by the ſaid *Earl* to his Children as he ſhould think convenient; and in another Clauſe reciting, whereas *I have contracted for the Sale of my Fee-Farm Rents*, my Will is, that if my Debts ſhall not be ſatisfy'd out of my other Eſtate, then my Executors (of whom the Earl of *Bridgwater* was one) *ſhall ſell ſome Part or all of them for Payment, &c. notwithſtanding my Rents are not deviſed by this my Will*; adjudg'd, That by thoſe Words *all my Eſtate Real and Perſonal*, the Fee-Farm Rents do paſs,

Counteſs of Bridgwater *verſus* Duke of Bolton, 1 Salk. 236.

paſs, becauſe the Word *Eſtate* is *Genus Generaliſſimum*, and includes the whole both Real and Perſonal; and *all my Eſtate*, is the whole Eſtate of the Teſtator, and a Deſcription of the Fee.

(4.) *There is a Caſe in* Jones, *where the Teſtator deviſed Lands to his Son, upon Condition that he allow his Brother Meat, Drink, Apparel, and convenient Lodging* It was objected, that the Son had only an Eſtate for Life, becauſe the Word *allow* implies, that the Allowance muſt ariſe out of the Profits; but it was adjudg'd a Fee-Simple immediately in the Son, becauſe the Brother was to have a preſent Maintenance, which might be a Charge to the Deviſee before he could receive any Thing out of the Profits. Lee *verſus* Withers, T. Jones 107.

(5.) *But there are many Caſes where the Deviſe was to diſpoſe, or to give, or to ſell at his Will or Pleaſure, &c. which make a Fee Simple.*

As where the Teſtator deviſed his Lands to his Wife, *to diſpoſe and employ* them upon herſelf and her Sons *at her Will and Pleaſure*; adjudg'd, That ſhe had a Fee-Simple, for the Law ſhall conſtrue theſe Words ſo, as to ſupply the Defect of other Words, and make them agreeable to the Intent of the Teſtator. Moor 57.

So a Deviſe to *Edyth* for Life, Remainder to *R. B.* in Tail, and if he die without Iſſue of his Body, living *Edyth*, then the Land to remain to her to *diſpoſe at her Pleaſure*; adjudg'd, ſhe had a Fee-Simple. Jennor *verſus* Hardy, 1 Leon 156.

And yet where the Deviſe was to his Wife *to diſpoſe at her Will and Pleaſure*, and to give it to which of her Sons *ſhe pleaſeth*, (*Jones* reports it, *ſhe thinks beſt*) the Court was divided upon the latter Clauſe, Whether it was an Eſtate for Life in the Wife, with a Power to her to diſpoſe the Reverſion? or, Whether ſhe had a Fee-Simple with a reſtrictive Power, to alien it to no Body Daniel *verſus* Upley, Latch. 9; 39, 134. W. Jones 137.

but to one of her Children? And Justice *Doderidge* was of Opinion that she had a Fee-Simple, *&c.*

Liefe *versus* Saltingstall, 1 Mod. 189 2 Lev. 104.

But where there was a Devise to the Wife *for Life*, with a Power to her *to dispose, &c.* to such of her Children as she shall think fit; and she by a Writing in which this Clause was recited, did dispose the same after her Decease to her Son *Philip* and his Heirs; it was adjudg'd, That by the Word *dispose* is meant a bequeathing in Fee, or at least a Power to dispose the Fee-Simple; and that though the Wife had only an Estate for Life, yet she had a Power to dispose the Fee; 'tis true, this was against the Opinion of the Chief Justice *Vaughan*, which was, That the Wife having an express Estate devised to her *for her Life only*, she could not give a greater Estate which she had not, and 'tis probable he might ground his Opinion upon that Case in *Leon.* where the Devise was to his Wife *for Life*, and she to *give it after her Decease to whom she will*; adjudg'd, That if there had not been an express Devise to *her Life*, it had been a Fee; but now she had it only for Life, with a Power to dispose the Reversion, and then the Grantee will be in by the Will of the Testator.

3 Leon 71. 4 Leon 41.

But Justice *Levintz*, who reports the same Case, tells us, the Court was divided, and that *Vaughan* held she had a Fee-Simple; but he did not report it on his own Knowledge, but upon the Relation of Serjeant *Willmote*.

North *versus* Crompton 1 Ch. Rep. 262.

A Devise of all his Real and Personal Estate to *H. N.* to *dispose for the Payment* of her Debts; it was decreed, That this was an Estate in Fee to *H. N.* and that it was no imply'd Trust in him, for the Heir to have the Surplus after Debts paid.

Whiskon *versus* Cleyton, 1 Leon 156

A Devise to his Wife for Life, then to his Son, and if he fail, then all his Part to *the Discretion* of

of his Father; adjudg'd, that the Father had a Fee-Simple; and ſo it had been if he had deviſed that the Lands ſhould be *at his Diſpoſition*, or I will my Land to him to give and ſell *at his Pleaſure*.

So where the Teſtator deviſed ſeveral Parts of his Lands to his three Sons, *John*, *Stephen*, and *Roger*, ſeverally, and if they live to the Age of 21, and have Iſſue of their Bodies, then to them and their Heirs in Manner as aforeſaid, to *give and ſell at their Pleaſure*; but if one of them die without Iſſue of his Body, then the other Brothers to have it in Manner as aforeſaid; and if all die without Iſſue, then to be ſold. Adjudg'd, that this was a Fee-Simple in them when they came of Age and had Iſſue; for though the Words *if they have Iſſue of their Bodies*, create an Eſtate-Tail by Implication; yet that could not be the Intention of the Teſtator in this Will, becauſe the Sons had Power *to give and ſell it at Pleaſure*, which Tenant in Tail cannot do. And if it ſhould be admitted that the laſt Clauſe, *viz. if all die without Iſſue*, ſhould make an Eſtate-Tail, yet the Limitation of an abſolute Fee in the former Part of the Will ſhall not be controuled by an Implication of an Eſtate Tail in the latter Clauſe. Brian *verſus* Cawſon, 2 Leon 68. 3 Leon 115.

The Teſtator being ſeis'd in Fee, deviſed his Lands to his Son *George and his Heirs*, and if he ſhould die before 21, and *without Heirs of his Body*, Remainder over. The better Opinion was, that *George* had an Eſtate in Fee, for ſuch an Eſtate is expreſly deviſed to him in the firſt Clauſe of the Will; and then the ſubſequent Words, *viz.* if he die before 21, and *without Heirs of his Body*, are not Words of *Limitation* of the Eſtate, but qualify it with a collateral Determination upon thoſe Hall *verſus* Deering, Hardres 148.

Contingencies, *viz.* that his Eſtate in Fee ſhall not determine, unleſs he die before Age, and without Iſſue.

Norton verſus Ladd, 1 Lut. 762.

(6.) *By a Deviſe of the whole Remainder an Eſtate in Fee paſſeth*; as for Inſtance, the Teſtator deviſed his Lands to his Siſter for Life, and after her Deceaſe the *whole Remainder of all thoſe Lands* to his Brother, which he had given to his Siſter for her Life in Caſe he ſhould ſurvive her, and if not, then his *whole Remainder* to his other Siſters and their Heirs; adjudg'd, That by the Words *whole Remainder* a Fee paſſed; for it cannot extend to the Quantity of the Land, but to the Quantity of *Eſtate* in the Land which was not diſpos'd to his Siſter, for the whole Land was given to her for Life, ſo there could be no Remainder of that; therefore it muſt of Neceſſity extend to *the Eſtate* in the Land.

Laſtly, A Deviſe of Legacies to be paid out of Lands; in ſuch Caſe, if the Profits will not amount to pay the ſame at the Time limited for the Payment, it is a Deviſe of the Lands in Fee; as for Inſtance, the Teſtator being ſeiz'd of Lands in *Pimbow* of the yearly Value of 34 *l. per Annum*, then in Leaſe for Life, and only 40 *s.* Rent reſerv'd, he deviſed ſeveral Legacies amounting to 97 *l. to be paid* out of his Lands in *Pimbow*, ſome within a Year after his Death, and deviſed the ſaid Lands to *Richard* without limiting for what Eſtate, and dy'd. The Queſtion was, What Eſtate *Richard* had in *Pimbow*? It was objected, he had only an Eſtate for Life, becauſe the Charge of Payment of the Legacies was not on his *Perſon*, but on the *Lands*; but adjudg'd he had a Fee-Simple; for he may ſuſtain a Loſs by the Payment of the Legacies, becauſe the Profits of the Lands would not amount to the Sum of 97 *l.* in the Time wherein the Legacies were appoint-

Freake verſus Lee, T. Jones 113. 2 Lev. 249.

ed

ed to be paid, and this is not a Condition, for then the Heir might enter upon the Non-Performance.

In Ejectment the Caſe was, The Teſtator being ſeis'd in Fee, deviſed ſeveral perſonal Legacies, and amongſt the reſt *four Coats to four poor Boys of the Pariſh of* C. *for ever*, and all his Lands, *&c.* (which were of the Value of 1000*l.* and more) he deviſed to his Wife *Margaret and her Aſſigns*, and made her ſole Executrix, and dy'd; ſhe marry'd again, and then Huſband and Wife levy'd a Fine, and declar'd the Uſes to themſelves, and to the Survivor for Life, Remainder to the Huſband and his Heirs with Warranty; adjudg'd, That *Margaret* had a Fee-Simple by this Deviſe, becauſe ſhe took the Lands with a perpetual Charge to find *four Coats* for four poor Boys for ever. *Smith verſus Tindall*, 2 Salk. 685.

Feme-Covert, Executrix, &c.

See *Bonis Propriis*, ante 125, 129.

IN ſome of the old Books 'tis held, that a Feme-Covert may be made Executrix without the Aſſent of her Huſband; and in ſuch Caſe ſhe may adminiſter alone, and that the Huſband could not releaſe any Duty which was due to her Teſtator. 13 Ed. 1. Fitz Executor 119. Keilw. 122

And ſo where a Woman was made Executrix, and afterwards marry'd, and then an Action of Debt was brought againſt Huſband and Wife, who pleaded that the Wife had fully adminiſter'd. The Plaintiff reply'd, That the Wife had Aſſets, without mentioning the Huſband; and this Replication was held good, becauſe as the Law then ſtood, ſhe might adminiſter alone, and make Diſtribution without him. 18 H. 6. 4.

But

But these Cases are not Law at this Time, for the Husband and Wife are but one Person in Law, and therefore she cannot take upon her to be Executrix without his Assent; for if she could, then he himself would be Executor against his Will; and this seems clear by the later Authorities, for if she is made Executrix, she cannot bring an Action alone, but her Husband must join with her, and he cannot be compell'd if he should refuse to join in such Action, neither can she be compell'd to plead without her Husband.

19 H. 6. 25.

21 H. 5. 6.

Besides, a Release of her Husband is a good Bar to any Action brought by her alone as Executrix, but she cannot release without him, and his Release is not only good during the Coverture, but for ever, because a personal Action once suspended, is quite gone.

33 H. 6. 31. 21 H. 6. 30. 39 H. 6. 15, 16. 9 Ed. 4. 42.

But though she cannot sue or be sued without him, yet she may deliver any of her Testator's Goods to another to keep; she may pay Legacies, and receive Debts, and may give Acquittances without her Husband; and if such Acquittances should make a * *Devastavit*, it shall bind both him and her, because she could not administer without his Assent; and it shall be accounted his Folly to suffer such a Person to administer.

16 H. 7. 5, 6. 2 And. 117. 7 H. 4. 13. Fitz Executor 55. * 21 H. 7. 15.

But if a Woman is made Executrix, and she afterwards marries, and her Husband *wastes* the Goods, and then she dies, there is no Remedy against the Husband at Common Law; but he is punishable in the Spiritual Court, and liable to make Restitution.

1 Roll. Abr. 919.

If a Feme-Sole is made Executrix, and she afterwards marries, and *refuses to prove the Will*, her Husband may do it, and administer in her Right,

H. 6. 31. Fitz Executor 23.

Right, which will conclude her during his Life, but not afterwards.

If ſhe is made Executrix *by her Huſband*, and then marrieth a ſecond Time, ſhe may pay a Legacy notwithſtanding her Coverture, and ſuch Payment is good without the Huſband. 7H. 4. 12.

A Feme-Sole and another were made Executrixes; ſhe marry'd, and before the Property of the Goods were alter'd, ſhe dy'd, the ſurviving Executrix may have an Action of *Detinue* againſt the Huſband for any of the Teſtator's Goods.

The Debtor made his Wife and two others Executrixes, and dy'd; the Creditor marry'd the Widow *before ſhe adminiſtred*, and brought an Action againſt the other two Executrixes, and held good; which he could not have done if his Wife *had adminiſtred*, for then the Action muſt be brought againſt all three Executrixes, and that could not be, for he cannot ſue his Wife. 11H. 4. 83.

She may make an Executor of the Goods which ſhe hath *as Executrix*, or of any Thing which ſhe had in Action; and of ſuch Things ſhe may make her Huſband Executor if he will accept it. 1 Roll. Abr. 912, 915. 4 H. 6. 31. Fitz Deviſe 5.

And of ſuch Things which ſhe hath as *Executrix*, ſhe may *make a Will* without the Aſſent of her Huſband; and if ſhe die without making any Diſpoſition of it, the next of Kin to her Teſtator ſhall have Adminiſtration *de Bonis non*, which will entitle him to the Goods, and not her Huſband; for he can have no Right, becauſe his Wife had none but in *auter droit*.

But generally ſpeaking ſhe cannot make a *Will* without the Aſſent of her Huſband; but if ſhe publiſh it after his Death 'tis good; and as ſhe cannot make a Will, ſo ſhe cannot make an *Executor* without his Conſent; but if a Bond is made 12H. 7. 22. 23. Plow. Com. 344.

made to her *dum sola*, and then she marries, she may make an Executor with his Assent, and so
2 And. 91, 92. she may in Case her Goods are wrongfully taken away from her *dum sola*, and she afterwards marrieth, for otherwise these *Choses in Action* will be lost, for the Husband cannot have them; therefore the Law allows her to make an Executor with
6 Ed. 2. Fitz Executor 109. his Consent, and in such Case the Executor may have an Action to recover them.

2 And. 181 A Feme-Sole made a *Will*, and afterwards marry'd, and during the Coverture she *revoked the Will*; this was held to be a good *Revocation*, and made the Will void.

In many Cases 'tis adjudg'd, That a Feme-Covert hath no Power to make a *Will*; I shall mention the most material, *viz.* *R. B.* devised his
Fitz Devise 15. Lands to his two Daughters, and to the Heirs of their *two Bodies*; and for Default of such Issue the Reversion to his own right Heirs. One of the Daughters dy'd without Issue; the Survivor marry'd, and *devised* the *whole Fee* to her *Husband*, and dy'd without Issue. The *Husband* marry'd another Woman, to whom he devised the said Lands for Life, Remainder over. The Sister of *R. B.* as Heir at Law enter'd, and adjudg'd lawful, because the Feme who devised it to her Husband, being Covert, she had no Power to do it in Prejudice of the Heir in Reversion, and the Entry of the Husband was only an Abatement.

‖ Estonversus Wood, Cro. Eliz. 27. * Marriot versus Kinsman, Cro. Car. 219. In Propriety of Speech, what a Woman doth whilst she is Covert, cannot be call'd a *Will*, because she is so entirely *sub potestate viri*, that she cannot make what is properly a ‖ *Will*; and therefore by the later Authorities 'tis call'd an * *Appointment*; and the usual Way is, for the intended Husband to give Bond before Marriage, with a Con-

a Condition to permit his Wife to make a *Will*, and to diſpoſe of what ſhall be agreed on, *viz.* Money or Legacies to ſuch a Value, and to pay what ſhe appoints not exceeding that Value; in ſuch Caſe, if after the Marriage ſhe makes a Will, and diſpoſes Legacies accordingly, though in ſtrictneſs of Law ſhe cannot be permitted to make a Will without her Huſband's Aſſent, yet this is an Appointment purporting a Will, which the Huſband by his Bond is bound to perform. Cro. Car. 376. S. P.

And ſo it was held in another Caſe, where an Action of Debt was brought on ſuch a Bond, condition'd, Whereas the Defendant was about to marry a Widow, and if he ſhould ſurvive her, that then if within three Months after her Deceaſe, he ſhould pay to the Obligee 300 *l.* to and for ſuch Uſes as the Wife by any Writing under her Hand ſhould appoint, then the Bond ſhould be void. The Defendant pleaded ſhe made no *Appointment*. The Plaintiff *reply'd*, ſhe made a *Will*, and did appoint the Payment of ſo much Money, and that the Defendant had not paid it; and upon Demurrer this Replication was adjudg'd to be good; for though a Feme-Covert cannot make a *Will*, without the Aſſent of her Huſband after 'tis made, yet this Declaration in Form of a Will, is a good *Appointment*. *Tylley verſus Peirce*, Cro. Car. 376.

So where the Condition of the Bond was, that the Obligor being about to marry a Widow, if he ſhould permit her to make a Will to ſuch a Value, to be paid within a Year after her Deceaſe, then, *&c.* the Defendant pleaded, That he did permit her to make a Will, And upon Demurrer adjudg'd no Plea, becauſe he ought to have pleaded, that he had paid the Money accordingly; *Sherman verſus Lilly*, Cro. Car. 597. 2 Roll. Abr. 247.

ingly; for otherwiſe it doth not anſwer the whole Condition.

Horſey *verſus* Daniel, 2 Lev. 161.

If a Feme *Executrix* ſurvive her Huſband, ſhe ſhall be charged for the Damages recover'd in a *Devaſtavit* during the Coverture, but not for the Coſts *de Bonis Propriis*, becauſe ſhe could have no Goods during the Coverture.

Having given ſome Inſtances where a *Feme-Covert* may be an *Executrix*, and what Acts ſhe may do as ſuch, and whether ſhe may make a *Will* or not, I ſhall now proceed to ſhew:

(1.) *When her Huſband ſhall not have the Benefit of the Perſonal Eſtate which ſhe had as Executrix.*

(2.) *Where he ſhall be charged with his own Acts, and with the Acts of his Wife who was an Executrix, and where not.*

(3.) *Where his Executor ſhall have no Benefit of the Eſtate of his Wife Executrix.*

(4.) *What the Law is, where the Executrix marries the Debtor of her Teſtator.*

(5.) *Where her Acts are good without the Huſband.*

(6.) *What the Law is, where the Huſband purchaſeth the Reverſion of a Term which his Wife had as Executrix.*

Hunks *verſus* Alborough, Dyer 331. 1 And. 157 Moor 98.

(1.) *A Feme-Covert was made Executrix*, and the Teſtator gave her the *Reſidue* of his Goods after Legacies were paid, to diſpoſe for the Wealth of his Soul, and to pay his Debts; ſhe poſſeſs'd her ſelf, and paid the Debts and Legacies, and marry'd one *Hunks* a ſecond Huſband, who poſſeſſed himſelf of the Reſidue of the Goods, and made the Defendant his *Executor* and dy'd; adjudg'd, that the *Widow*, and not the *ſaid Executor*, ſhall have the Goods. My Lord *Dyer*, who reports the

the Caſe, gives no Reaſon for the Judgment. But the other Reporters tell us, it was becauſe the Widow took the Goods as *Executrix*, and not as *Deviſee*; for if ſhe had taken them as *Deviſee*, then her ſecond Huſband would have been entitled to them, and by Conſequence his *Executor*.

A Widow *Adminiſtratrix* to her former Huſband marry'd; the Huſband and Wife brought an Action of Debt on a Bond due to the Inteſtate, and had Judgment; then the Wife died, and the Huſband brought a *Sci' Fac'* to have Execution, *&c.* and upon Demurrer adjudg'd, that it did not lie, becauſe the Recovery was in *auter droit*, *viz.* in Right of the Inteſtate, and the Adminiſtratrix dying before Execution, the Duty will remain to him who takes out a new Adminiſtration to the Inteſtate; for whoever brings a *Sci' Fac'* muſt have a *Property* as well as a *Privity* to the Debt recover'd: Now, though the Huſband in this Caſe is *privy* to the Judgment, becauſe he is a Party to it, yet he hath no *Property* in the Debt recover'd, becauſe he is not Adminiſtrator.

Beamont *verſus* Long, W. Jones 248. Cro. Car. 208, 227.

Cro. Car. 464. S. P. *See* Stat. 17. Car. 2. cap. 8.

But if the Debt had been due to the * *Feme dum ſola*, and then ſhe marrieth, and the † Huſband and Wife recover, and then the Wife dies before Execution, in ſuch Caſe the Huſband ſhall have a *Sci' Fac'*, becauſe by the Recovery of the Debt, which was *Originally due* to her in her own Right, the Huſband is entitled to it, and 'tis become a proper Debt due to him, and therefore he ſhall have a *Sci' Fac'* after her Deceaſe; but if ſhe die before the ‖ Debt is recover'd, then the Huſband cannot ſue for it, and the Ordinary hath nothing to do with it; but ſhe might have made her Huſband Executor, and by this Means he might recover the Debt.

* Miles's *Caſe*, 1 Mod. 179.

† *Or if the Feme recover dum ſola and marry, and dies, the Huſband may have a* Sci' Fac'; *for by the awarding Execution, he ſhall have the Debt by Survivorſhip.*

(2.) *The*

year's *Caſe*, 9 Will'i. ‖ Jones *verſus* Roe, W. Jones 175.

(2.) *The Caſes where he ſhall be charged with the Acts of his Wife who was Executrix, are as follow:*

Wilcocks *verſus* Watſon, Cro. Eliz. 405. Moor 396.

If. Feme Sole Executrix made a fraudulent Gift of Goods, and continu'd ſtill in Poſſeſſion; afterwards ſhe marry'd and dy'd; one of the *Creditors* of her Teſtator brought an Action of Debt on a Bond againſt the Huſband as *Executor*, who pleaded *plene adminiſtravit*, and all this being found Specially, it was adjudg'd for the Plantiff; for the Gift being fraudulent, the Property of the Goods ſtill remain'd in the Wife as Executrix, and the Huſband having paid Legacies after her Death, made himſelf Executor *de ſon Tort*, and ſo the Action was well brought againſt him.

So where the Wife was Adminiſtratrix, and dy'd, and Debt was brought againſt her Huſband as Executor, who pleaded *ne unques Executor*, and the Jury found that Adminiſtration was committed to his Wife, and that ſhe was dead, and that the Huſband kept *bonam partem Bonorum* in his Hands, and ſold them: Now though *bona pars* is very uncertain, yet if he detain any Part, he is Executor *de ſon Tort*, and ſo chargeable.

Lumley *verſus* Hatton, 1 Roll. Rep. 268.

Feme Executrix had Aſſets of the Teſtator, which ſhe *waſted*, and then marry'd again; now, though none of thoſe Aſſets came to the Hands of her Huſband, yet my Lord *Coke* was of Opinion, that he ſhall be charged *de Bonis Propriis* for the *Devaſtavit* of the Wife before Coverture.

Kings *verſus* Hilton, Cro. Car. 603. 1 Roll. Abr. 935.

So where Debt was brought againſt Huſband and Wife as *Adminiſtratrix* to her firſt Huſband, and Judgment againſt them; and upon a *Fi' Fac'* the Sheriff return'd *nulla Bona* of the Inteſtate. Afterwards a *Teſtatum Fi' Fac'* was brought againſt them according to *Pettifer*'s Caſe, and the Sheriff, upon an Inquiſition found, made the ſame Return, that *they* had *nulla Bona*, but that the Wife had Goods of her former Huſband to the Value of 100 *l.*

and

and that ſhe waſted them during her Widowhood, and that the Huſband had not waſted, *& ſi devaſtaverunt*, according to the Writ, the Jury pray the Diſcretion of the Court, and adjudg'd, that by this Return of what the Inquiſition found, it was a *Devaſtavit* in them both.

But in ſome Caſes the Huſband is not chargeable, as where a Man deviſed a Legacy and made his Wife Executrix, ſhe marry'd a ſecond Huſband, and he poſſeſſed himſelf of the Goods of her firſt Huſband, and then ſhe dy'd inteſtate; adjudg'd, that this ſecond Huſband is not chargeable with the Payment of the Legacy by Way of Action; for he is neither Executor or Adminiſtrator, nor privy to the Will of the firſt Huſband; and he having a Title to the Goods by the Inter-marriage with the Executrix, is not chargeable either in the Spiritual-Court, or at Common-Law, unleſs he had converted them to his own Uſe after the Death of his Wife; and in ſuch Caſe he might be compell'd to take out Adminiſtration, to the Intent that he may be ſu'd in the Spiritual Court for the Legacy. Smith *verſus* Jones, Yel. 184. 2 Cro. 257.

(2.) And as in the Caſes before-mention'd, the *Huſband* ſhall have no Benefit, *ſo in many Caſes his Executor ſhall have none.*

As where a Rent was granted to Huſband and Wife for their Lives, the Rent was arrear, the Huſband dy'd, and more Rent became due after his Death; then the Wife dy'd inteſtate, and her Adminiſtrator brought an Action of Debt for the whole; and adjudg'd that it lay, becauſe the Arrears ſurviv'd to her, and was as well due as the Rent incurr'd after her Huſband's Death. Temple *verſus* Temple, Cro. Eliz.

So where Huſband and Wife had a Decree for Money in Right of the Wife, and the Huſband dy'd, the *Wife*, and not the *Executor of the Huſband* ſhall have the Benefit of this Decree. Manney *verſus* Martin, 1 Ch. Rep. 27.

Withers *verſus* Kelſea, 1 Ch. Rep. 289.

But where the Wife had a *Portion charg'd on Lands*, and the Huſband made her a Jointure and dy'd before the Portion was receiv'd; this is not in the Nature of a *Choſe in Action*, but of a Rent, becauſe it was *charg'd on Lands*; and 'tis given to the Huſband by the Inter-marriage, and by Conſequence goeth to his Executor, and not to the Wife, *ſed quære.*

(4.) *Where the Executrix marries the Debtor of her Teſtator, the Debt is only ſuſpended for a Time.*

Croſſman, *verſus* Read, Cro. Eliz. 114. Moor 236. 1 Leon 320

ſſ. A Feme Sole Executrix marry'd the Debtor of her Teſtator, then her Huſband dy'd, and an Action of Debt being brought againſt her, ſhe pleaded *Riens inter maines.* And the Queſtion was, Whether this Inter-marriage was a *Devaſtavit*, which it muſt be, if it was a Releaſe, or the Debt was extinct? But adjudg'd that it was not *extinct*, becauſe ſhe was entitled to it in *auter droit*, and therefore 'twas only *ſuſpended*, and that upon the Death of her Huſband the Action would revive, which ſhe might maintain againſt his Executor.

8 Rep. 136. a.

So in Sir *John Needham's* Caſe. *ſſ.* A Widow Executrix to her Huſband, the *Obligee* marry'd the *Obligor*; it was adjudg'd a *Suſpenſion* and not an *Extinguiſhment* of the Debt, becauſe ſhe had it by Act of Law, and in *auter droit*; but if the Obligee had made the Obligor Executor, the Debt is *extinct*, becauſe 'tis his own Act.

(5.) *Generally ſpeaking, her Acts are not good without her Huſband*; I ſhall inſtance in one which is good.

Fenner *verſus* Dives, 1 Sid. 31.

ſſ. Sir *Lewis Dives* acknowledg'd a Statute to the Lady *Fenner's* Huſband, who dy'd and left his Wife Executrix; ſhe prov'd the Will and marry'd again; and ſhe alone, without her Huſband, acknowledg'd Satisfaction, though the Money was not paid; and adjudg'd good.

A Feme

(6.) *A Feme Executrix was poſſeſs'd of a Leaſe for Years, her Huſband purchaſed the Reverſion*, the Term is *extinct* as to her if ſhe ſurvive: But in reſpect of Strangers or Creditors, it ſhall have a Continuance, and be Aſſets in her Hands. Moor 54.

Feme-Covert put out Money in the Name of another, but for her own Uſe, though the Perſon in whoſe Name it is put out is but a Truſtee, yet in Law 'tis his Money, and the Wife hath no Remedy but in a Court of Equity; therefore the Huſband ſhall not have it as Huſband, but he may have it as *Adminiſtrator* to his Wife. *Sir* John St. John's *Caſe*. March 44.

Gavelkind-Lands deviſable by Cuſtom.

ANNO 15 *Car.* 1. It was a Queſtion whether Lands in *Gavelkind* holden in Socage, could be deviſed by Will; that is, whether there was any Cuſtom in *Kent* to ſupport ſuch Deviſe before the Statute 32 *H.* 8. and it was inſiſted that there was ſuch a Cuſtom, for *Fitz-Herbert* in his *Natura Brevium* tells us, that the Writ *ex gravi querela* lies where a Man is ſeiſed of Lands or Tenements in any City or Borough, or in *Gavelkind*, which Time out of Mind *have been deviſable by Will*, and the Teſtator doth deviſe the ſame either in Fee or in Tail, the Deviſee ſhall have the Writ, to compel the Execution of ſuch Deviſe. And Mr. *Lambert* in his *Perambulation of Kent* tells us, Lands in *Gavelkind* may be *given or ſold*, viz. *given*, and that is by *Will*; and *ſold*, that is, by *Deed*; and many Wills were produced out of the Regiſters Offices of *Canterbury* and *Rocheſter*, where ſuch Lands were deviſed in the ſeveral Reigns of *H.* 6. *Edw.* 4. and *H.* 7. and ſome Verdicts by which ſuch Cuſtom was found of late Years; and for an ancient Preſident, there was one produc'd out of *Lambert*, which was a Will of *Gavelkind Lands* Launder *verſus* Brooks, Cro. Car. 561. F.N.B. 198 Litera L.

before the Conqueſt. And upon a full Evidence *Anno* 13 *Car.* 1. the Defendant had a Verdict, that there was ſuch a Cuſtom; and ſo it was held in this Caſe.

Guardianſhip, Deviſe thereof.

12 Car. 2. cap. 24.

BY the Statute 12 *Car.* 2. 'tis enacted, That *where any Perſon hath a Child under Age of* 21, *and not marry'd at the Time of his Death, the* ‖ *Father of ſuch Child, whether born, or* in Ventre ſa mere, *may by Deed executed in his Life-time, or by his laſt Will,* &c. *diſpoſe the Cuſtody of ſuch Child, 'till he ſhall arrive at* 21, *or for any leſſer Term, and ſuch Diſpoſition ſhall be good againſt any one claiming as Guardian in Socage; and the Perſon to whom the Cuſtody is ſo deviſed, may have an Action of Treſpaſs againſt any one who ſhall take him away, and recover Damages for the Benefit of the Child. And he may receive the Rents and Profits of all his Lands and Tenements, but for the Uſe of ſuch Child, and alſo the perſonal Eſtate, during the Time that he is appointed Guardian,* for the like Benefit.

‖ *Tho' under Age himſelf: See* 18. Probate

The Meaning of which is, That whereas all *Tenures* were now made *Free Socage*, and the *next of Kin* to whom the Land cannot deſcend, is *Guardian* until the Heir is 14 Years of Age; yet now the Father may nominate the Guardian to his Heir, and for any Time, until the Heir is 21, and ſuch Guardian ſhall have like Remedy for the Ward, as the Guardian in *Socage* had at Common Law.

Before this Act, Tenant in Socage of full Age might have diſpos'd his *Lands* in Truſt, for the Benefit of his Heir, but he could not diſpoſe the *Cuſtody* of the Heir himſelf, for the Law gave that to the *next of Kin*, to whom the Land could not deſcend.

But

But Tenant in Socage *under Age* could not make any Diſpoſition of the *Lands* for the Benefit of the Heir, which he may now do by the Act; for having Power to nominate who ſhall have the Cuſtody, and for what Time, the Lands follow the Guardianſhip, not as an Intereſt deviſed by the Teſtator, but as an Incident given by the Law to attend the Cuſtody.

And therefore ſuch a ſpecial Guardian cannot transfer or aſſign the Cuſtody of the Ward, either by Deed or Will, for the Truſt is perſonal, and not aſſignable, neither ſhall it go to his Executors or Adminiſtrators, but it ſhall determine by the Death of the Guardian. Bedell *verſus* Conſtable, Vaugh. 180.

Before this Statute, if Tenant by *Knight-Service* had deviſ'd the Guardianſhip of his Heir, it had been void as to the *Lord*, for he ſhall have the Guardianſhip by Reaſon of the Tenure of the Land; and ſuch a Will ſhall not bar a Guardian in Socage, for he claims nothing but for the Uſe of the Heir. Keilw. 186. F N.B 143 B.

And ſince the Statute it hath been adjudg'd, That a Copy-holder is not within that Act to diſpoſe the Cuſtody of his Children; for that belongs to the Lord, according to the Cuſtom of the Mannor, but not *de Jure*; for if there is no ſuch Cuſtom, then the next of Kin to whom the Land cannot deſcend, ſhall have the Cuſtody of the Infant, as well as of his Lands; but if there is ſuch a Cuſtom, then this Statute ſhall not deſtroy the Validity thereof; becauſe, if it ſhould, it might be prejudicial to the Lord of the Mannor. Clench *verſus* Cudmore, 3 Lev. 395 2 Lut. 1181. Hutt 16, 17.

Heir.

THE Word *Heir* may be conſider'd in two Capacities, *viz.* As he *qui ex juſtis nuptiis procreatus eſt*, and to whom the Inheritance of Lands

doth deſcend, after the Death of his Anceſtor by Right of Blood, and ſuch an *Heir* is call'd *Hæres natus*, for no Man can be truly call'd an Heir, but he who the Law makes ſo; yet there is another Heir by Appellation, and vulgar Acceptation, and he is call'd *Hæres factus*; and in ſuch Caſe the Word *Heir* is not conſider'd as it relates to an *Anceſtor*, but to the Thing to be *inherited*, *viz. to Lands or Tenements*; and wherever there is *Hæres factus*, the Word *Heir* can have no Relation but to the *Teſtator's Lands*, for he cannot, in Propriety of Speech, be made *Heir* to any Thing elſe.

And generally by that Word he hath the Fee-Simple of the Lands; as if the Teſtator appoint *R. B.* to be *Heir to his Land*, he ſhall have it in Fee, for he ſhall inherit ſuch an Eſtate in it as the Teſtator had; and tho' he appoint him to be his *Heir generally*, and doth not ſay to his *Land*; yet by the Word *Heir* all the Lands are convey'd, and this is adjudg'd, both by the Civil Law, and our Law, for he is *Hæres Teſtamentarius*, and falſe Writing will not vitiate ſuch Will; as if the Teſtator had made his Couſin *R. B.* ſole *Ayere and Texecutor*, yet the Deviſe is good.

Tayler *verſus* Webb, Stiles 301. 307, 319.

But there may be a Caſe wherein the Word *Heir* doth not import a *Fee*, as if the Teſtator deviſe Lands to *R. B.* and other Lands to *W. N.* and doth not ſay for what Eſtate; and farther, that if either of them die, then one ſhould be the others *Heir*, without ſaying to what *Land*; in this Caſe the Survivor ſhall have only an Eſtate for Life, becauſe the Perſon to whom he is made *Heir* had no larger an Eſtate.

But as to making a Fee-Simple, the Word *Heir* in the ſingular Number hath the ſame Effect with *Heirs*, as a Deviſe to *B.* for Life, and after his Deceaſe, to the *Heir* of his Body, *&c.* there the Word *Heir* is *nomen collectivum*, and is the ſame with

Pawſley *verſus* Lowdall, 1 Roll. Abr. 253.

with *Heirs*; and *B.* ſhall have a Fee-Simple extended; and 'tis not like *Archer's* Caſe, for there the Deviſe was to the Father for Life, Remainder to his right *Heir Male*, in the ſingular Number, as in this Caſe; but then it goes on, *viz.* and to the *Heirs Males of his Body, &c.* ſo there the Inheritance is limited to the Heirs Males of the Body of the Heir Male. *Aſt. Tit.* Remainder.

This Word is not a good Deſcription of the Perſon in the Life-time of the *Anceſtor*, as where the Teſtator had Iſſue two Sons then living, and a Daughter, and deviſed his Lands to his youngeſt Son in Tail, and for want of Iſſue by him, then to the *Heirs* of the Body of the eldeſt Son, and if he die without Iſſue, then to his Daughter in Fee: The youngeſt Son dy'd without Iſſue; the eldeſt Son dy'd leaving Iſſue; adjudged, that the Daughter ſhould have the Land, becauſe the eldeſt Son could not take by the Name of *Heir*, in the Life-time of his Father. Chaloner *verſus* Bowyer, 2 Leon. 70.

Yet where the Teſtator being ſeiſed of Lands in *Chobham* in Fee, deviſed the ſame to one *Higden* and his Heirs, for the Life of *Robert Durdant*, in Truſt for him, and after his Death, to the Heirs Males of *Robert Durdant then living*; *Robert* had at that Time Iſſue *George* his only Son; adjudged, that this was a Remainder executed in *George*, by the Name of *Heirs Males*; tho' it was objected that *nemo eſt hæres viventis*; for the Words *now living*, muſt refer to the Heirs Males of *Robert Durdant*, who were then living, which was *George*; ſo that there was a plain Deſcription of him, tho' it was improper to call him *Heir*. 'Tis true, *Robert Durdant* was the *proximum antecedens* to the Words *now living*, but it would be abſurd to conſtrue thoſe Words to relate to him; becauſe the Teſtator had taken Notice before, that he was living; ſo Judgment was given for the Right James *verſus* Richardſon, *aliter* Burchet *verſus* Durdant, 2 Lev. 232. Raim. 330. T. Jones 99. 1 Vent. 334. 2 Vent. 311.

of *George*, which *Jones* tells us, was reverſed in the Exchequer Chamber; but 'tis a Miſtake, for *Ventris* ſays it was affirm'd.

I ſhall now proceed to ſhew:

(1.) *Where he ſhall have an Action, tho' not named.*
(2.) *How he is chargeable upon a Bond or other Specialty of his Anceſtor.*
(3.) *What goes to him, and not to the Executor.*

Sacheverell *verſus* Frogate, 2 Lev. 13. 1 Vent. 161. 2 Sand. 367

(1.) If his Anceſtor make a Leaſe, *reddendum* a certain Rent to himſelf, his *Executors or Aſſigns, during the Term*, and the Heir brings an Action of Debt for the Rent; it was objected, that he could not maintain ſuch Action, becauſe he is not named in the Reſervation; and that it was ſo adjudg'd, *Anno* 33 *Eliz.* in the like Caſe, between *Richmond* and *Butler*, which is reported in many Books; but my Lord *Rolls* in reporting it leaves out (*during the Term,*) So it was likewiſe adjudg'd, *Anno* 20 *Jac.* in the Caſe of †*Sury* and *Cole*, where the Reſervation was to the Leſſee and his Aſſigns, during the Life of the Leſſor; in both which Caſes it was adjudg'd, that the Heir could not have the Action; but notwithſtanding theſe Judgments, it was reſolved in this Caſe, that the Heir ſhall have the Action, becauſe the Rent being incident to the Reverſion, ſhall continue after the Death of the Leſſor, and go to the *Heir*; and ſo it was adjudg'd in the Caſe of *Sury* and *Cole*, as it appear'd upon Search of the Roll.

Richmond *verſus* Butler, Owen 9. Cro. Eliz. 217. 1 And. 261. †Roll. Abr. 451. †Sury *verſus* Cole, *aliter* Sury *verſus* Brown, Latch. 44. 274.

Longheen *verſus* Williams, 2 Lev. 92.

So where the Leſſee covenanted with the Leſſor, his *Executors and Adminiſtrators*, to repair and to leave it ſo at the End of the Term; now tho' the Heir is not nam'd in the Covenant, yet he, and not the Executor, ſhall have the Action, becauſe 'tis a Covenant which goes with the Land.

But

But in ſome Caſes, the *Executor*, tho' not named, ſhall have the Action and not the *Heir*, as where a Man bought Lands, and the Vender covenanted, that he, his *Heirs and Aſſigns* ſhould quietly enjoy, but afterwards he was evicted and dy'd; his Executor brought an Action of Covenant and held good, becauſe the Eviction was done to his Teſtator; the Damages ſhall be recover'd by the Executor, tho' not named, for he repreſents his Perſon. Lucy *verſus* Levingſton, 2 Lev. 26.

(2.) *The Heir is chargeable upon a Bond or other Specialty of his Anceſtor, tho' the Executor hath Aſſets,* as where Debt was brought againſt him upon a Bond of his Anceſtor, he pleaded, that Adminiſtration of his Goods was granted to *R. B.* and that he had Aſſets, *&c.* and upon Demurrer this held an ill Plea, becauſe the Plaintiff hath Election either to ſue the *Heir* or *Executor*. Davis *verſus* Church, 3 Lev. 189.

Before the Statute 3 & 4 *W. & M.* there were three Things requiſite to make an Heir chargeable with a Debt upon Specialty of his Anceſtor. 3 & 4 W. & M. cap. 14.

(1.) *He muſt be bound by Name.*

(2.) *He muſt have Aſſets in Fee-Simple by Deſcent and not in Tail, or by any Conveyance whatſoever.*

(3.) *The Land deſcended muſt be in the Poſſeſſion of the Heir at the Time of the Action brought againſt him.*

For if after the Death of the Anceſtor, the Land ſhould be ſold *bona fide* before the Action brought, the Heir was ſafe; becauſe he was only chargeable in Reſpect of the Land.

But now by that Statute, 'tis enacted, *That where any Heir at Law ſhall be liable to pay a Debt of his Anceſtor in Regard of any Lands deſcended, and ſhall alien, ſell, or make over the ſame before any*

Action

Action brought, or Proceſs ſued againſt him, ſuch Heir ſhall be anſwerable for the Debt or Debts, in an Action of Debt to the Value of the Land which he ſold; in which Caſe all Creditors ſhall be preferr'd, as in Actions againſt Executors or Adminiſtrators, and Execution ſhall be taken out upon a Judgment recover'd againſt ſuch Heir, to the Value of the ſaid Lands, as if it was his own proper Debt, ſaving, that the Lands, Tenements, and Hereditaments, bona fide, *aliened before the Action brought, ſhall not be liable to ſuch Execution.*

And 'tis farther provided by the ſaid Statute, that in an Action of Debt, upon a Specialty brought againſt an Heir, he may plead *Riens per Deſcent* at the Time of the original Writ brought; and the Plaintiff may reply, that he had Lands, Tenements, or Hereditaments, from his Anceſtor before the original Writ brought; and if the Plaintiff hath a Verdict, the Jury ſhall enquire of the Value of the Lands deſcended, and thereupon Judgment ſhall be given, and Execution awarded as aforeſaid.

But if the Judgment is by Confeſſion, without confeſſing Aſſets deſcended, or upon Demurrer, it ſhall be for the Debt, or Damages, without any Writ of Enquiry of the Value of the Lands deſcended.

By the ſame Act, all Wills of *Lands, Rents, &c.* are made fraudulent againſt Creditors, their Heirs, Executors, and Adminiſtrators; and every ſuch Creditor may have an Action of Debt upon his Bond or Specialty againſt the Heir at Law of the Obligor, and againſt the Deviſee jointly.

See Aſſets, *ante* 100. *See* Authority, *ante* 111.

(3.) *As to the Right of the Heir excluſive from the Executor, 'tis generally held,* That where the Teſtaſtor dy'd, ſeiſed of the Inheritance of a *Dovehouſe, Park, Pond,* or *Warren,* that the *Pigeons, Deer, Fiſhes,* and *Coneys,* belong to the *Heir*; and ſo doth

doth *Glaſs*, *Wainſcot*, and generally every Thing which is fixed to the Freehold, and which cannot be removed without doing ſome Injury to the Houſe, for all thoſe Things are accounted Parcel of the Freehold.

So likewiſe all *Writings* which concern the Inheritance; and as to this Matter there is a nice Diſtinction in my Lord *Rolls*, *viz.* If the Teſtator recover in an Action of Detinue for *Writings in a Box*, and then dies, *his Executor* ſhall have the Execution, and Damages, and Coſts, becauſe of the Box: But if the Judgment was obtain'd for the Writing it ſelf without the *Box*, and the Writing cannot be had, *then his Heir* ſhall have Execution, and the Damages, and Coſts. 1 Roll. Abr. 925.

But the three principal Things which go to the Heir are,

(1.) *Corn.*
(2.) *Money*,
(3.) *Rent.*

(1.) As to *Corn*, tho' generally it goes to the Executor, yet in ſome Caſes it belongs to the Heir; as for Inſtance:

The *Teſtator* being ſeis'd in Fee *ſow'd the Land*, and then deviſed *it* to *R. B.* for Life, Remainder to *W. N.* for Life, and dy'd, and *R. B.* dy'd before the *Corn* was ſever'd; adjudged, that he in Remainder ſhall have it, becauſe it paſſed to him by the Deviſe of the *Land*, and eſpecially in this Caſe, becauſe it did not come by the Manurance of the firſt Tenant for Life; but if he had deviſed the *Corn it ſelf* to another, it had been otherwiſe; for by ſuch a Deviſe the Corn would be in Nature of a Chattel, ſever'd from the Land. Cro. Eliz. 61. Spencer's *Caſe*. Winch 51.

So if *Tenant for Life* ſoweth the Land, and grant over his Eſtate, and the Grantee dieth before the Corn is cut, he in Reverſion ſhall have it. Cro. Eliz. 464.

So

So if Leſſee for a certain Number of Years, ſoweth the Land a little before End of his Term, which expires before 'tis ripe, the Heir ſhall have the Corn.

(2.) *In ſome Caſes likewiſe the Heir ſhall have the Money agreed to be paid in the Life time of the Teſtator.*

Randal's cited in Goodale's Caſe, 5 Rep. 96. b.

As for Inſtance, *Edward Randall* covenanted with *Brown*, that if he paid 400 *l.* before ſuch a Day to the ſaid *Randall*, *his Heirs or Aſſigns*, that then the ſaid *Randall* and his Heirs, would ſtand ſeiſed, *&c.* to the Uſe of *Brown* and his Heirs. Afterwards *Randall* deviſed the Lands to his Wife, during the Minority of his Son, and made her and others Executors, and died *before the Day of Payment*. The Queſtion was, to whom the Money ſhould be paid? Adjudged, that by the Word *Aſſigns*, the *Aſſignees* in Fact of the Eſtate of *Randall* were intended: But if he had made a Feoffment upon Condition that the Feoffee pay the Money to *Randall*, his Heirs or Aſſigns, that being a Condition which could not be aſſigned over, the Law ſhall adjudge who was his *Aſſignee*, and that is his *Executor*: But in this Caſe of *Randall*, the *Heir*, and not the *Executor*, ſhall have the *Money*, becauſe the *Heir* was expreſly named, which excludes the *Executor*.

Freak *verſus* Hearſay, 1 Ch. Rep. 51.

So in ſome Caſes the *Heir of the Mortgagee*, and not his Executor, ſhall have the *Mortgage-Money*; but if the *Heir* exhibit his Bill againſt the *Mortgager* to have the Money, or to make farther Aſſurance, or to be fore-cloſed, the Executor of the Mortgagee muſt be likewiſe made a Party, becauſe it may happen that he may have a Title to the Money, and for want of his being a Party, 'tis a good Demurrer to the Bill.

* 1 Inſt. 209. *b.*

If the Condition of Redemption is, that the * Money ſhall be paid to the Mortgagee or *his Heirs*,

in

in such Case, if the Mortgagee dieth before the Day of Payment, it shall go to his *Heir*, for *designatio unius est exclusio alterius*; but if this be paid to his Heirs, Executors, or Administrators, it may be paid to either.

But as to the Word *Assigns*, beforementioned, 'tis true, an *Executor* is an *Assignee* in Law; but if a Condition of a Bond is, that the Obligor shall pay 20 *l.* to such Person as the Obligee shall, by his last Will, appoint, if he make an Executor and doth not appoint who shall receive it; in such Case, the Executor shall not have it as *Assignee in Law*, because it appears that the Obligee intended it for *an Assignee in Fact* of his own making; for the Word *Pay* in the Bond implies a Property, and therefore he who should have been appointed by him, was to receive it for his own Use; but if 'tis received by an Assignee in Law, 'tis for the Use of the Testator, which was never intended by the Bond. 1 Roll. Abr. 915.

(3.) *As to Rent, if 'tis reserved payable at* Michaelmas, *or within ten Days afterwards*, in such Case, if the Lessor dies after *Michaelmas*, and before the ten Days, the Heir shall have the *Rent*, as incident to the Reversion; for 'tis not due till the ten Days are expired. Clunn's *Case*, 10 Rep. 128. 2 Cro. 305. Pilkington *versus* Dalton, Cro. Eliz. 575. S. P.

* It was covenanted by Articles, that one should have a Lease of the Lands, and in Consideration thereof, the other *covenanted and granted* for himself, his Heirs, and Executors, *&c.* to pay to the Lessor, his Heirs, and Executors, the yearly Rent of 90 *l.* First, it was adjudg'd, that this amounted to a Lease. 2d. That it enures as a *Rent*, by way of *Reservation*, and by Consequence goes to the *Heir*; for as the Words *Covenant and Grant* on the Part of the *Lessor* makes it a Lease, and binds the *Heir*; so the same Words, *viz. Covenant and Grant* to pay a yearly Rent on the Part of the Smith *versus* Bustard, Dyer 142. S. P. * Drake *versus* Monday, Cro. Car. 207. W. Jones 231.

the *Leſſee* amount to a *Reſervation*, and the rather becauſe he covenants and grants to pay it to the Heir.

Tipping *verſus* Grover, Raim. 18.

So where the Teſtator was ſeiſed of Tythes *for another Man's Life*, and made a Leaſe thereof to the Defendant rend'ring Rent, who died, and Debt was brought againſt his Executors for Rent-Arrear; and upon Demurrer to the Declaration, the Court was of Opinion, that this was a Rent incident to the Reverſion, and goes to the *Heir*. See *Tit. Dying*, *ante* 259.

Implication by Deviſe, *See* 188.

See Remainder, Poſt.

'TIS a Rule in Law, that a *Will* ſhall not be conſtrued by *Implication* to diſinherit an *Heir*, unleſs ſuch Implication is *neceſſary*, and not only *conſtructive* and *poſſible*: As for Inſtance, a Deviſe of his *Goods* to his Wife, and that *after her Deceaſe* his *Son* ſhall have them and *the Houſe, &c.* this is an Eſtate for Life to her of *the Houſe*, tho' 'tis not deviſed to her by expreſs Words, becauſe no other Perſon could take in the mean Time; but if the Deviſe had been to a *Stranger*, and not to the *Son*, *after the Death of the Wife*; in ſuch Caſe the *Heir* ſhall have it during *her Life*, becauſe 'tis not a Deviſe to the *Wife*, by any *neceſſary Implication*.

Br. Deviſe, pl. 52. 13 H. 7. 17. Moor 7.

Horton *verſus* Horton, 2 Cro. 74. 1 Roll. Abr. 844.

Smartle *verſus* Scholar, T. Jones 98 3 Lev. 207.

What is meant by a *neceſſary Implication* is thus, *viz.* where the Wife muſt have the Thing deviſed, or no Body elſe can; as in the Caſe before-mentioned, where no Body could have the Houſe during her Life; for it appeared, that the Teſtator did not intend his *Son* ſhould have it till after her Deceaſe; ſo that he who was his *Heir* was excluded during *her Life*.

1 Vent. 223.

But a Deviſe of Lands to *R. B. after the Death of the Wife*, this is no Deviſe to her by Implication,

tion, becauſe *R. B.* was not *Heir at Law* to the Teſtator, and it may as reaſonably be intended, that he ſhall have the Lands as the Wife; and in ſuch Caſe the Intent ought not to be conſtrued to diſinherit him, by croſſing the Diſpoſition which the Law would have made if no ſuch Deviſe had been, but it muſt deſcend as it ought.

I ſhall give one Inſtance of a *poſſible Implication*, and ſo proceed, *viz.* the Teſtator being ſeiſed in Fee of a *Mannor*, Part in *Demeſnes*, and Part in *Services*, deviſed all the *Demeſnes* expreſly to his Wife for Life, and the *Services* likewiſe to her for 15 Years, and by the ſame Will deviſed *all the Mannor* to another, *after the Death of his Wife*; this was only a *poſſible Implication* that the Wife ſhould have the *whole Mannor* for her Life, and not being a *neceſſary Implication*, it was adjudged, that ſhe ſhould have no more than was expreſly deviſed to her, *viz.* the Demeſnes for Life, and the Services for 15 Years, and afterwards that the Heir ſhould have them. Moor 7.

And in all Caſes of *poſſible Implications*, that is, where it may be intended that the Teſtator deviſed his Lands to *R. B.* and it may as reaſonably be intended he deviſed them to *W. N.* in ſuch Caſe the *Intent* ought not to be conſtrued to diſinherit the Heir, but it ſhall go to him.

As where the Deviſe was of Part of his Lands to his Wife for Life, and that it and *all the reſt* of his Lands ſhould remain to his youngeſt Son, and to the Heirs of his Body *after the Death of his Wife*. It was inſiſted, that the Wife ſhould not have *all the reſt of the Lands* by Implication, becauſe there was an expreſs Deviſe of certain Lands to her before, which ſhews the Intent of the Teſtator, that ſhe ſhould not have the whole. And ſo Serjeant *Moor* reports it to be adjudged, and that the Heir ſhall have it during the Life of the Wife: But Juſtice Higham's *Caſe*, Cro. Eliz. 15. 2 & 3 Leon. 226, 130. Moor 123. Godb. 16.

Juſtice *Croke*, who reports the ſame Caſe, tells us, that it was adjudged the Wife ſhould have the whole.

But in theſe Deviſes by *Implication* there is a Difference, where the Teſtator was ſeiſed *in Fee*, and where he had only a *Term for Years*; for if he was only poſſeſſed of a Term *for Years*, and deviſed, that *after the Death of his Wife*, his Sons ſhall have the whole Profits of his Farm, and that the Survivor ſhall appoint who ſhall have the Reſidue; it was adjudged, that ſhe had no Eſtate by Implication for her Life, as ſhe would if it had been an Inheritance, becauſe the Teſtator himſelf, even in his Life-time, could not, by the Rules of Law, create an Eſtate for *Life* out of a Term of Years; but in this Caſe the Wife being made Executrix, ſhe had the whole Term by Vertue thereof.

Rayman *verſus* Gold. Moor 635.

So where the Teſtator was poſſeſſed of a Term for Years, and deviſed it to his *Wife for Life*, Remainder to his Son *Thomas* and *Lucy* his Wife, if they have no Iſſue-Male; and *if they have Iſſue-Male*, then to be reſerved for them. Here was no expreſs Deviſe to the Iſſue-Male, but they ſhall take it by *Implication*; 'tis true, this was againſt the Opinion of Juſtice *Croke* as reported by *Godbolt*, who likewiſe reports, that the Teſtator was ſeiſed *in Fee*, but that is a Miſtake.

Blandford *verſus* Blandford Moor 846. Godb. 266.

But Juſtice *Croke*, who reports the ſame Caſe, tells us, that the Deviſe was to the Wife *for Life*, and after her Deceaſe to *Thomas* and *Lawrence*, his Sons, equally and jointly together, if they have no Sons; but if *both* of them have Male Children, then to be put out for the Profit of both their Sons jointly, or to one of them, if they both have not Male-Children, Remainder over. *Thomas* had a Son, and died; adjudged, that *Lawrence* would have an Eſtate for Life, if it had not been for this ſubſequent

Mr. Bulſtrode *reports it*, If they, or either of them.

ſubſequent Clauſe; yet ſince the Teſtator appointed it to be put out for the Benefit of their *Male-Children*, 'tis a Deviſe to the Son of *Thomas* immediately, and he ſhall not ſtay till after the Death of his Father and Uncle *Lawrence*.

Concerning Eſtates Tail by Implication, the Rule before-mention'd holds in ſuch Caſes, viz. that the Implication muſt be neceſſary, and not only poſſible, as may appear in the Inſtances following.

If. The Teſtator had two Sons, and deviſed Part of the Land to his eldeſt Son in Tail, and the other Part to his youngeſt Son in Tail, and *if any of his Sons died without Iſſue, then the Whole ſhould remain to* R. B. *in Fee*, the youngeſt Son died without Iſſue; adjudged, that the Brothers had croſs Remainders, and that the eldeſt ſhall have the Whole by Implication; and that there was no neceſſary Implication that *R. B.* ſhould have the dead Man's Part. 4 Leon. 14

So where the Teſtator had three Sons, *Thomas*, *Richard*, and *Gilbert*; *Thomas*, the eldeſt, died, leaving his Wife with Child, the Teſtator deviſed an Annuity to the Child in *Ventre ſa mere* for 20 Years; and if my Son *Richard* die *before he hath any Iſſue of his Body*, Remainder over. Adjudged, that by theſe Words *Richard* had an Eſtate-Tail by *Implication*. Newton *verſus* Bernardine, Moor 127.

So where the Teſtator deviſed the *Rents and Profits* of his Lands, to raiſe Portions for his Daughters, and afterwards the *Rents and Profits* to be wholly for the Uſe of his Son *George*; and if it happen that *George* and his Siſters *die without Iſſue of their Bodies*, then all his Freehold Lands ſhall be and remain to *William Roſe* and his Heirs; adjudged, that this was not a Deviſe to *George*, and his Siſters, for their Lives, with reſpective Inheritances in Tail by any *Implication*; but by a grammatical and common Intendment, the Words Gardener *verſus* Sheldon, Vaugh 259.

import only a Deſignation of the Time when the Land ſhall come to *William Roſe*, *viz.* when *George* and his Siſters die without Iſſue, and not before, and the Intention muſt be as if thus expreſſed, *viz.* I leave my Land to deſcend to my Son *George* and his Heirs; until he and his Siſters ſhall die without Iſſue, and then to *William Roſe*: Or thus, *viz.* *George* and his Heirs ſhall have my Land as long as any Heirs of the Body of him and his Siſters are living; and for want of ſuch Heirs, I deviſe my Land to *William Roſe*.

Holmes *verſus* Meynell, Raim. 452

So where the Teſtator deviſed his Lands in *Derbyſhire*, to his two Daughters and their Heirs, equally to be divided, and *if they die without Iſſue*, then *all his Lands* to his Nephew *Francis* in Tail, Remainder over: The youngeſt Daughter died without Iſſue; the Queſtion was, Whether *Francis* ſhall have her Part, or whether the ſurviving Siſter ſhall have an *Eſtate-Tail* in it by Way of Remainder by *Implication*? Adjudged, that the Daughters had *ſeveral Eſtates-Tail by Moieties*, and that the Survivor ſhall have the whole by way of Croſs Remainder by *Implication*, and that *Francis* ſhall have nothing till both are dead without Iſſue; for he ſhall not take by the Death of *one*, becauſe the Will is, *if they die without Iſſue*, then *all* his Land ſhall go to him.

And as to an Eſtate in *Fee-Simple by Implication*, tho' there is a perpetual Charge impoſed upon the Deviſee, yet that doth not make it a Fee-Simple: As for Inſtance,

Standish *verſus* Short, Bridgm: 163.

The Teſtator deviſed, that a Chaplain ſhall be always maintained, and that he ſhall have eight Marks yearly Stipend out of ſuch a Houſe, that it ſhall be provided and found by the Parſon of the Pariſh and four Pariſhioners, and that the *Reſidue of the Profits* of the Houſe, ſhall be beſtowed by them to buy Ornaments and Books for the Church: Now

Now tho' here is a perpetual Charge impoſed on the Parſon, *viz.* to find a Chaplain, and to buy Ornaments, and to be defray'd out of the Profits of the Houſe, yet this is not a Deviſe of the Houſe to him by Implication.

In a ſpecial Verdict in Treſpaſs the Caſe, was, the Teſtator having three Daughters, deviſed his Lands to his two youngeſt Daughters for Life, *Remainder to the next of Kin of the Blood of the Teſtator*; the Queſtion was, Whether this Remainder ſhall go to the eldeſt Daughter alone, or to all three equally? Adjudged, that it ſhall go to the eldeſt alone, becauſe the *expreſs Eſtate* deviſed to the two youngeſt, ſhall exclude both of them and their Iſſue from taking any Eſtate *by Implication.* Perriman *verſus* Peirce. Palm. 11. 303.

Deviſe to *W. R. for Life*, Remainder to his firſt, ſecond and tenth Son in Tail-Male; and if he die *without Iſſue-Male of his Body*, Remainder over: Afterwards, by a Codicile, the Teſtator recited, that he had given an *Eſtate-Tail* to *W. R. &c.* Adjudged, that where a particular Eſtate is deviſed, as in this Caſe it was expreſly to *W. R. for Life*, a contrary Intent ſhall never be implied by any ſubſequent Clauſe, and therefore theſe Words, *If* W. R. *die without Iſſue-Male of his Body*, ſhall be conſtrued a dying without ſuch Iſſue-Male as are expreſſed in the Will; for there is a great Difference between a *Deviſe to* W. R. *and if he die without Iſſue*, Remainder over, and a *Deviſe to* W. R. *for Life, and if he die without Iſſue*, Remainder over. Popham *verſus* Bamfield. 1 Salk. 236.

Incertainty.

See *Deſcription of the Perſon.*

WHEN a Will is ſo incertainly expreſſed that it cannot be underſtood what the Teſtator intended, 'tis void.

49 Affiſe 8. 49 Ed. 3. 3. Fitz Deviſe 7. As if a Man Deviſe his Lands to *R. B.* for Life, Remainder to the *beſt Man* of ſuch a Company, 'tis void.

So a Deviſe to one by a certain Name, without adding any other Deſcription of his Perſon, if there are two of that Name, is void.

So a Deviſe to his *beſt Friend*, or that his Goods ſhall be diſtributed, and doth not ſay amongſt whom; in this laſt Caſe 'tis ſaid, that the Law ſupplies the Intent, and interprets it to be amongſt the Poor, this is by the Civil-Law, but it muſt be where the Teſtator died without Iſſue.

Beal verſus Wyman, Bridg. 240. Deviſe of one half of his Land to his Wife for Life, and after her Death all his Lands to the Heirs-Males of *any of my Sons, or next of Kin*, it doth not appear whether he intended the Heir-Male of his Son, or the Heir-Male of his next of Kin, for the Words were in the diſ-junctive; and therefore the Court inclined, the Will was void for Incertainty.

Infant, Deviſe to him.

21 H. 6. 12. THERE is a Caſe in the Year-Book 11 *H.* 6. where 'tis held, that a Deviſe to an Infant in *Ventre ſa Mere* is good, and yet he is not *in Rerum Naturâ* at the Time of the Deviſe made, or Death of the Deviſor.

Dyer 303. a. 'Tis true, *Anno* 15 *&* 16 *Eliz.* there was a contrary Judgment, and the Reaſon then given was, becauſe

becauſe a Child in his Mother's Womb is not capable of taking any Thing. But my Lord *Hales* cauſed the Roll of that Caſe to be ſearched, and it doth not warrant the Judgment as reported by *Dyer*, and therefore it hath been ſince adjudged, that ſuch a Deviſe is good. 1 Lev. 135.

And this agrees with former Reſolutions in the like Caſe, *viz.* Lands were deviſed to two Perſons, and to the Child of the Teſtator in *Ventre ſa Mere*, this was held a good Deviſe; but it may be a Queſtion, Whether they are *Joint-tenants* or Tenants in Common? Moor 877.

In another Caſe, it was the Opinion of *Coke* and *Dodridge*, that where there is a Deviſe to an Infant in *Ventre ſa Mere*, and 'tis *not born* till after the Death the Teſtator; in ſuch Caſe the Deviſe is void; but this doth not agree with the Civil-Law, which accounts *Conception* for *Birth*, when it relates to the Benefit of an Infant. Simpſon verſus South, 2 Roll. Rep. 110.

Deviſe of a Term of Years *to his Daughters*, the Teſtator had two then born, and after his Death another was born; adjudged, that all three have a Title. Stanley verſus Baker, Moor 220.

And ſtill it was a Queſtion, Whether a Deviſe to an Infant in *Ventre ſa Mere* is good? For *Anno* 19 *Car.* 2. two Judges held that it was not, becauſe there muſt be a Deviſee as well as a Teſtator *in rerum Naturâ*, at the Time the Will takes effect. And Mr. *Sinderſin* tells us, that the Court was clearly of Opinion, that if the Deviſe had been to the Infant *when* it ſhall be born, it would have been good; but this doth not agree with the Reaſon before-mentioned, becauſe even in ſuch Caſe the Perſon is not in Being at the Time the Will takes Effect, ſo that a Deviſe to an Infant in his Mother's Womb, and Deviſe to him *when* he ſhall be born, are all one. Snow verſus Cutler, 1 Sid. 193. Raim. 162 1 Lev. 135

Two Judges, *viz. Twiſden* and *Keeling*, were o another Opinion, *viz.* That the Deviſe is good, and they ſaid that my Lord *Hales* and *Hide* were of the ſame Opinion; but becauſe the Court was now divided, it was adjourned into the *Exchequer-Chamber*, and the Parties agreed.

I ſhall now mention ſome Caſes concerning,

(1.) *An Infant being made Executor.*
(2.) *Concerning Releaſes and other Acts made by him.*
(3.) *Of Suits by and againſt him.*

21 Ed. 4. 13. 24. 16 H. 6. 1

(1.) An Infant may be made Executor, and may give Releaſes, and make any Acquittances concerning his Executorſhip; and may ſell the Goods of the Teſtator, and diſtribute the Money, which a Feme Covert cannot do without her Huſband.

Knott *verſus* Barlow, Cro. Eliz. 671.

But then ſuch Releaſe muſt be for a true and real Satisfaction made; otherwiſe 'tis void.

† Clerke *verſus* Hopkins, Cro. Eliz. 254.

'Tis lawful for him to ſell the † Goods of the Teſtator, becauſe he is bound to pay his Debts, and as his Sale is good, ſo is the Sale of another Perſon by his Conſent, where 'tis not to his Prejudice; and he who aſſiſts him in ſuch Sale, ſhall not be accounted an Adminiſtrator, but as a Servant to the Infant.

Manning's *Caſe*, 3 Leon. 143. Keilw. 51. 4 Leon. 210

And if an Infant-Executor ſell the Goods at an under-value, the Sale is good, and ſhall bind him, notwithſtanding his Nonage.

(2.) *As to Releaſes made by him*, if they amount to a *Devaſtavit*, 'tis void; for he ſhall receive no Prejudice by his Folly whilſt under Age, and 'tis a meer Act of Folly for an Infant to give a Releaſe without any Conſideration; and ſo it was adjudged * *Anno* 21 *Eliz.* which *Plowden* oppoſed; but *Wray* Chief-Juſtice told him, That he had con-

* Ruſſel's *Caſe*, Moor 146. 5 Rep. 27. 1 And. 117

ferred

ferred with all the Judges, who were all of Opinion for the Judgment.

Three Executors, one was an Infant of 18 Years, who received 50 *l.* and the Intereſt, the Bond being in the Penalty of 100 *l.* and gave a Releaſe for what he received; adjudged, that his receiving Part ſhall not be taken in Satisfaction for the whole 100 *l.* which was then forfeited for Non-Payment of the 50 *l.* upon the Day, and therefore his Releaſe was not good; but this was againſt the Opinion of Juſtice *Croke*, who held the Releaſe to be good, becauſe the Infant received all that was due in Conſcience; and his Releaſe could not amount to a *Devaſtavit*, becauſe he did what the Law would have compelled him to do. Kniverton *verſus* Latham, W. Jones. 400. Cro. Car. 490.

(3.) *If an Infant-Executor is ſued, he muſt appear by his Guardian*, and not by *Attorney*; but if he is Plaintiff, he may ſue *per Attornatum*, becauſe he ſues in the Right of another; 'tis true, it was otherwiſe held in the Caſe of *Bartholomew* and *Dighton*: But in the very next Year in another * Caſe, that was denied to be Law. Preſcott *verſus* Cotton, Popham 130. 1 Roll. Rep. 380. Bartholomow *verſus* Dighton, Cro. Eliz. 424. * Bade *verſus* Starkey, Cro. Eliz. 541.

But becauſe of theſe different Opinions the Matter was not ſettled; for many Years after it came again in Queſtion, where there were two Executors, and one an † *Infant*, whether he might ſue *per Attornatum*. It was objected he could not, becauſe an Infant cannot make a Warrant of Attorney, and by Intendment he cannot inſtruct an Attorney, if he could make one: But it was adjudged, That ſince one of the Executors was of full Age, they may both ſue *per Attornatum*, for both repreſent the Perſon of the Teſtator, and ſue in *auter droit*; and 'tis not reaſonable, that one ſhould ſue *per Attornatum*, and the other *per Guardianum*. The whole Court was of Opinion, that the Infant muſt be joined in the Action: But *Twiſden* held againſt the reſt, that the Infant † Foxniſt *verſus* Tremain, 1 Mod. 47. 2 Sand. 112 1 Lev. 299. 1 Sid. 449. 1 Vent. 102.

must not sue *per Attornatum*, for he cannot make a Warrant of Attorney; and if he is Non-suit he must be *in Misericordiâ*, which an Infant ought not to be.

If he is made Executor with another of full Age, and a Judgment is obtained by the Testator in his Life-time, the *Scire Fac'* upon such a Judgment may be brought by him of full Age alone, *viz.* The Testator obtained a Judgment, and afterwards devised his Estate to his Wife, and his Daughters, who were Infants, and made them Executrixes, and died. The Wife proved the Will with a *Reservatâ potestate* to the Daughters when they should come in, and brought a *Sci' Fac'* upon the Judgment, setting forth the whole Matter, that there were two other Executrixes under the Age of Seventeen; and adjudged, that the *Sci' Fac'* was brought by her alone, for the Infants could not prove the Will during the Nonage, and it would be very Inconvenient if the Execution of the Judgment should be suspended till they came of Age.

Hatton *versus* Maskew, *cited in* 1 Mod. 297. per Twisden, Raim. 298. 1 Lev. 181.

And as an Infant cannot prove a Will, so he cannot make one.

Intention. See *Exposition of Wills.*

THE *Intention* of the Testator is call'd by some Men the *Pole-Star*, to guide the Judges in the Exposition of Wills; and where that is doubtful, it ought to be interpreted by the Law of Nature, rather than by any Municipal-Law; for those are Laws which govern particular People and Nations, but the Law of Nature is inherent in all Mankind; therefore it must be presumed, that the Intention of the Testator was governed by that Law, and not by any other Law whatsoever.

Swinb. Part. 6. Sect. 11. *Sale of Lands by Executors,*

And

And tho' by our Law his *Intention* is more conſidered than his Words, yet the Words muſt be accommodated to his *Intention*, and that Intention muſt conſiſt with the Law, and muſt be collected out of the Words of the Will.

In all other Conveyances the Law requires *apt Words* to paſs Eſtates; but in Wills the *Intention* of the Teſtator is ſufficient, either to limit the Eſtate, or to deſcribe the Perſon who ſhall have it.

And therefore, if by a Grant or Feoffment an Eſtate is given to one *in perpetuum*, the Grantee hath but an Eſtate for Life; but if by Will, 'tis an Eſtate in Fee. So if the Teſtator deviſed his Lands to another to ſell and diſpoſe *at his Pleaſure*, this is a Fee-Simple, becauſe by theſe his *Intent* doth appear, that he ſhall have ſuch an Eſtate.

And as the Intention of the Teſtator is ſufficient to make an Eſtate in Fee without apt Words; ſo it is alſo ſufficient to *deſcribe the Perſon*, who ſhall take by the Deviſe, altho' he is not formally named, as he ought to be in Grants.

A Woman had Iſſue two Sons by two Huſbands, the laſt Huſband deviſed Lands to the Woman for Life, Remainder to the *next of Kin of the Woman*; adjudged, that the youngeſt Son ſhall have the Lands; for it being uncertain which ſhall have it, becauſe they are both equally of Kin to the Woman, therefore it ſhall be conſtrued, that the Intention of the Teſtator was, that his own Son ſhould have it. Dyer 333.

A Deviſe of Land to the *Church of St.* Andrew *in* Holborn, the Parſon of that Church ſhall have it, for the *Church* is incapable to take it; and therefore it ſhall be preſumed, that the Teſtator intended it for the Parſon.

So a Deviſe of a Term of Years to a Man and *his Heirs*, he ſhall have the whole Term; for tho' he cannot take it by the Words of the Will, accor- 2 And. 17.

ding

ding to the legal Conſtruction thereof; yet ſince it agrees with his Intent, that the Deviſee ſhould have what Eſtate he had in the Term, it ſhall go to him.

Lingen's Caſe, Dyer 323. 3 Leon. 48.

So where a Man deviſed that his Feoffees and their Heirs ſhould ſtand ſeized to the Uſe of *Jane his Daughter*, and the Heirs of her Body, which *Jane was a Baſtard*; yet this was held a good Deviſe by the Intention of the Teſtator.

Moor 10.

'Tis true, this was doubted *Anno* 4 *Ed.* 6. where the Deviſe was of his Goods to his *Children*, and one of them was a Baſtard; but it was held clearly, if the *Mother* of a Baſtard had made ſuch a Will, it had been good, becauſe 'tis plain that the Legatee was her *Child*.

Buffeild *verſus* Byboro, Poph. 188. *Reported by* Rolls *by the Name of* Briſfeild *verſus* Knasborough, 1 Roll. Abr. 611. *See* 1 Leon. 311. Hob. 32. 1 Lutw. 735

A Deviſee that *A.* and *B.* his *Feoffees* ſhall ſtand ſeiſed to and for *John Collins*, for Life, Remainder over, when in Truth he had no Feoffees; yet this is a good Deviſe to him, by Reaſon of the Intention of the Teſtator, which is apparent that *John Collins* ſhould have it.

* Rearſby *verſus* Rearſby 1 Leon. 13.

* Grant of a Mannor to Huſband and Wife, and to the Heirs of the Huſband, who by Will deviſed a Rent-Charge of 4 *l.* out of the ſaid Mannor, with a Clauſe of Diſtreſs, *for the Livelihood and Child's Part* of the Deviſee, *to be paid yearly*; the Huſband died, and about 19 Years the Wife died, and then the Deviſee diſtrein'd for all the Arrears of Rent incurr'd after the Death of the Huſband, and before the Death of the Wife, and in Replevin avow'd for the ſame, and adjudg'd good, becauſe the Deviſe of the Rent being for *his Livelihood and Child's Part*: Theſe Words imply a preſent *Advancement* of him, and the ſubſequent Words *to be paid yearly* ſhew, that the Teſtator intended it as ſuch.

The Huſband deviſed Lands to his Wife for Life, Remainder to *W. R.* and the *Heirs Males* of his

his Body; and if he die without *Heirs of his Body* (without ſaying *Males*) Remainder over to another in Fee; adjudged, that the Condition did not alter the firſt Eſtate Tail, becauſe the Intention of the Teſtator did plainly appear. M. 2 Eliz. Dyer.

Intereſt. See *Authority.* See *Tit. Legacy.*

Inventory.

THIS is a true Deſcription of the Goods and Chattels of the Deceas'd, and of the Values thereof, to be appraiſed by two indifferent Perſons; and it is made for the Benefit of the Creditors and Legatees, that the Executor ſhould not conceal any Thing.

Now the Reaſon why the Goods are to be valued, is, becauſe if undervalued, the Creditors may take them as appraiſed; if overvalued, it ſhall not prejudice the Executor; therefore the Value to which they are appraiſed is not concluding, but the true Value as found by a Jury.

The Manner of making it is in *Writing indented*, whereof one Part ſhall be exhibited to the Spiritual Court by the *Executor* on Oath, and the other Part is to remain with *him.*

By the Civil-Law the *Heir* was obliged to ſatisfy all the Debts of the Teſtator, by Reaſon whereof it ſometimes happened that the Inheritance was prejudicial to him, for he might pay more than it was worth; therefore *Juſtinian* ordained, That if the Heir would exhibit a true Inventory of all the Goods and Chattels of the Deceaſed, he ſhould be no farther chargeable than to the Value of the Inventory; and ſo much Strictneſs was requir'd by that Law in making an Inventory, that if the Heir neglected it for a Year or more, he was obliged to pay all the Legacies, tho' he had not ſufficient of the Teſtator's Eſtate to do it;

it; this ſeems very unreaſonable, and therefore 'tis not allow'd by our Law.

By the Civil-Law likewiſe, an Executor was puniſhable, if he intermeddled with the Goods before he had exhibited an Inventory, or for diſpoſing them to any one, other than ſuch which *ſervando ſervari non poſſunt*, this is only as a Caution for the Executor to make an Inventory; for if he made none, and yet poſſeſſed himſelf of the Goods, it might prove injurious to him, becauſe he might be compelled to diſcharge the Debts and Legacies out of his own Eſtate, if the Teſtator's Goods and Chattels were not ſufficient to do it; for it ſhall be preſumed againſt him that they were ſufficient.

21 H. 8. cap. 5. By our Law, *viz.* by the *Statute* 21 *H.* 8. *cap.* 5. Executor or Adminiſtrator is to call to his Aſſiſtance, either two Creditors, or two of the next of Kin, or two Neighbours or Friends of the Deceaſed, and in their Preſence to cauſe a true Inventory to be made of the Goods and Chattels, Wares, and Merchandize, as well Moveable as not Moveable, and ſhall deliver the ſame on Oath unto the Ordinary indented; of which one Part ſhall remain with him, and the other Part with the ſaid Executor or Adminiſtrator.

The Intention of this Statute was for the Benefit of the Creditors and Legatees.

By the Civil-Law it was to be exhibited within three Months after the Death of the Teſtator; but if 'tis done afterwards 'tis good, but the Ordinary may diſpence with the Time of bringing it in; and ſo he may, whether 'tis brought in or not, as appears in the following Caſe.

Boon's Caſe, Raim. 470. *Ff. Thomas Boon*, a Merchant in *Exeter*, being poſſeſſed of a perſonal Eſtate, to the Value of 100,000 *l.* which lay in ſeveral Places; and upon ſeveral Securities, deviſed ſome conſiderable Portions to his Daughters,

Daughters, but left his ſecond Son *Chriſtopher* 2000 *l.* and no more, to be paid at three Payments, and made *John*, his eldeſt Son, Executor, who proved the Will, and made Oath to bring in the Inventory as uſual; and not doing it at the Time appointed by the Judge of the Prerogative, he was cited by his Brother *Chriſtopher* for that Purpoſe, and the Will being proved *per Teſtes*, the Judge did not think the *Inventory* neceſſary to be exhibited, becauſe there were two Payments already made to him, and his Brother offered to pay the Reſidue; thereupon *Chriſtopher* appealed to the Delegates, who gave Sentence that there was no Occaſion for an *Inventory*; then he brought a Commiſſion of Review, and alledged, That there might be another Will, wherein *Chriſtopher* might be Executor, and therefore an *Inventory* muſt be neceſſary, otherwiſe he muſt loſe his Eſtate: Beſides, there may be Specialties taken in his Name, and no Truſt declared, and that the preſent Executor might die Inteſtate; and if ſo, the Adminiſtrator *de Bonis non, &c.* will belong to *Chriſtopher*. And laſtly, That the Statute requires him to exhibit an Inventory, and he is ſworn to do it, but the Sentence was confirmed, for none of thoſe Objections ſhall be preſumed. And as for the Statute, it was made for the Benefit of the *Creditors and Legatees*, and here they were all paid, or the Money was tender'd to be paid, and no Creditors complaining; and ſince this Eſtate conſiſted moſt in Specialties, it might be prejudicial to the Debtors to have their Debts diſcover'd, eſpecially where it was not neceſſary to make ſuch a Diſcovery.

Laſtly, As to Things which are to be put in the Inventory, it has been already ſaid, That all the perſonal Eſtate of what Nature or Quality ſoever it be, but the Goods to which the Huſband is entitled

entitled as Adminiſtrator to his Wife, are not to be put in the Inventory after her Death; but Things which are in Action muſt be put in.

An Adminiſtratrix exhibited an Inventory, in which ſhe put ſome Goods which the Inteſtate had given to a younger Child, and which were actually in his Poſſeſſion; and this Deed of Gift ſhe pleaded in the Spiritual Court, and the Plea being rejected there, a Prohibition was granted.

3 Bulſ. 315 James *verſus* James.

Joint-Executors: See *Co Executors.*

Jointenants by Deviſe.

ARE thoſe who have an Eſtate *jointly* by one one and the ſame Title and they differ from *Tenants in common and Coparceners*; for in Caſe of Jointenancy the Survivor hath the whole, which the other hath not.

Owen 65. Cro. Eliz. 431. Goldſ. 28. 141. Dyer 350.

As if a Man had only *two Daughters*, and deviſed his Lands to them and *their Heirs*, this makes them Jointenants, becauſe 'tis a different Eſtate than what the Law would have given them without the Will; for in ſuch Caſe they would have been *Coparceners*, but by the Will they are *Jointenants.*

The Father had three Meſſuages, and having one Son and two Daughters, he deviſed the three Meſſuages to his Wife for Life, Remainder of one of the Meſſuages to his Son and his Heirs, Remainder of another to his eldeſt Daughter and her Heirs, Remainder of the other Meſſuage to his youngeſt Daughter and her Heirs; then he deviſed, that if any of his three Children ſhould die without Iſſue of his or her Body, then the other ſurviving ſhall have *totam illam partem*, between them to be equally divided. The Teſtator died, his Wife died, one of the Daughters died, but ſhe left Iſſue; then the Son died *without Iſſue*; then

then the ſurviving Siſter enter'd in the Meſſuage, deviſed to her Brother, and died, and her Husband held in as Tenant by the Courteſy; the Queſtion was, If the ſurviving Siſter ſhall have the whole Part deviſed to her Brother, or whether the Iſſue of the other Siſter ſhall be *Coparcener* with her? Adjudged, that the Words *totam illam partem* go to the Houſe, and not to the Eſtate; and if both the Daughters had ſurvived their Brother, they ſhould have been *Coparceners*, not by the Will, but by Deſcent; and the Deviſe being of the ſame Effect, then as to that Matter 'tis void, and the Common-Law ſhall take Place; and if ſo, then the Iſſue of the Siſter who firſt died, and the ſurviving Siſter, ſhall be *Coparceners*; adjudged againſt the Huſband. Prettiman *verſus* Cooks, 2 Leon. 193. *Poſtea* Tit. Life. S. C.

A Deviſe to *A.* in Fee, and in the ſame Will a Deviſe to *B.* in Fee, this makes them *Jointenants*. Cro. Eliz. 9. 3 Leon. 11.

Deviſe to his two Sons *jointly* and *ſeverally* for their Lives; this is a *Jointenancy*, and not a Tenancy in Common, notwithſtanding the Word *ſeverally*, becauſe 'tis coupled with the Word *jointly*. Morgan's *Caſe*, Poph. 52.

A Deviſe of ſeveral Parts of his Lands to his Sons in Tail, and if any die without Iſſue-Mail, that the *Survivor of each to be the others Heir*, but doth not ſay by *equal Portions*; this makes them *Jointenants*, for by tranſpoſing the Words the Senſe will be plain, *viz.* that *each Survivor ſhall be the others Heir*; ſo that if the other die without Iſſue-Male, (as it happened in this Caſe) the next Brother ſhall not have his Part alone, but all the ſurviving Brothers ſhall be *Jointenants*. Hambleden *verſus* Hambleden, *cited in* 1 And. 194. Owen 25. Cro. Eliz. 163. Goldſ. 100 1 Leon. 166. 3. Leon. 262.

As to the Word *equally* it generally makes a *Tenancy in Common*; but where the Deviſe was to two *equally* and to *their Heirs*, this made them *Jointenants*, becauſe they had equal Eſtates; but if it had Lowen *verſus* Bedd, 2 And. 17.

had been *equally to be divided*, they would have been *Tenants in Common.*

Dickens *verſus* Marſhall, Cro. Eliz. 330. Moor 594. Goldſ. 182.

'Tis true, three Years before the laſt Caſe, there was a contrary Judgment, as reported by Juſtice *Croke*, *viz.* That a Deviſe of his Lands to his Children, *equally to be divided between them*, made them *Jointenants*: But this is not only contrary to the fifth Reſolution in * *Ratcliff*'s Caſe, where my Lord *Coke* expreſly tells us, That it makes a *Tenancy in Common.* But it ſeems to be miſreported both by *Croke* and *Goldsborough*; for Serjeant *Moor*, who reports the ſame Caſe, tells us, it made a *Tenancy in Common.*

* 3 Rep. 39. *b.*

Furze *verſus* Weeks, *alias* Ford *verſus* Lenthall, 1 Roll. Abr. 90. Stiles 211.

So where the Teſtator had two Daughters and a Son, and deviſed his Lands to his Daughters *equally to be divided between them.* Adjudged, that this Clauſe made them *Tenants in Common*, but then theſe Words followed, *viz. Habendum to the Survivor of them, and to the Heirs of the Body of ſuch Survivor*, until each of *them receive* 150 l. *at one entire Payment*, upon Condition that upon Payment of the Money, the Will to be void. Now this ſubſequent Clauſe ſhews, That the Teſtator intended they ſhould be *Jointenants for Life*, and that the Survivor ſhould have an Eſtate-Tail in the whole, in Truſt to pay the Portion of the other, which might never have been paid if they had been *Tenants in Common for Life*; becauſe the Survivor would have been ſtill Tenant in Tail, and by the Death of one her Eſtate would be determined before the Portion paid, which is contrary to the very Conditon of this Will, *viz.* that it ſhould be void upon Payment of the Portion; which plainly ſhews, That the Teſtator did not intend her Eſtate ſhould determine till the Portion was paid.

The Teſtator had Iſſue four Daughters, and deviſed his Lands to his Wife for Life, and after her Deceaſe

Deceaſe, the ſame to be *equally divided* amongſt his Daughters *or their Heirs*; the eldeſt Daughter had at that Time Iſſue a Daughter, and whether ſhe ſhould have a 4th Part of the Lands was the Queſtion, her Mother being dead; and adjudg'd ſhe ſhould; for the Word *Heirs* was not added of Neceſſity to make the Siſters take by Purchaſe, but only to make the Heir of the eldeſt Daughter to take Part of the Land, and 'tis the ſtronger being in the Disjunctive. Taylor *verſus* Hodgkins God. 363

By the Statute 4 *Annæ* 'tis enacted, That Actions of Accompt may be brought by one Jointenant or Tenant in Common, his Executors or Adminiſtrators, againſt the other as Bailiff or Receiver, if he receive more than his Share or Proportion, and alſo againſt the Executors or Adminiſtrators of ſuch Jointenant, or Tenant in Common. 4 Annæ, cap. 16.

Before this Statute *the Jointenant* had no Remedy at Common Law againſt his *Companion*, to recover Damages for what he had taken, more than his Share of the Profits of the Eſtate, or for any Goods or Chattels of which they were *Jointenants*, but the other was to do the like if he could; for there was a Privity in Truſt between them, which is the Reaſon they muſt all join in an Action. But if two alone brought an Action where there were three, and the Defendant doth not take Advantage by pleading the Jointenancy in Abatement, but pleads the general Iſſue, they ſhall recover two Parts in three. 1 Lev. 232.

If *one Jointenant* makes a *Leaſe* for Years, reſerving Rent, this is no *Severance* of the Jointenancy; for he who made the Leaſe hath a Reverſion expectant upon the Determination of the Term, and the other Jointenant hath the Freehold and Inheritance in Poſſeſſion, and ſhall have 1 Inſt. 185. a. 2 Lutw. 1173.

the Reverſion alſo by Survivorſhip, but not the Rent.

Aylett *verſus* Choppin, 2Cro. 259. Yel. 183. 1Bulſt. 42.

Deviſe to his *two Sons*, and to the *Heirs Males of their Bodies*; but that they ſhould not enter till their ſeveral Ages of 21 Years, and that his *Executors ſhould have the Lands to perform his Will in the mean Time.* Adjudg'd, That the Eſtate of the Executors as to the Poſſeſſion of the Lands, ſhall precede the *joint Eſtate* to the Sons, and then the Deviſe will be, that his Executors ſhall have the Poſſeſſion until his Sons come of Age, and then they ſhall have it; and the Entry of one, and taking Poſſeſſion *when of full Age*, ſhall not deſtroy the *Jointenancy*, becauſe his Entry was only to take the Profits, and not as to the Eſtate in Jointenancy.

Deviſe to her Son in Tail, Remainder to her two Daughters, and to the Heirs of their Bodies begotten, by equal Portions, *equally to be divided amongſt* them; the Son dy'd without Iſſue; adjudg'd, That the two Daughters were *Tenants in Common*; for theſe Words in a Will (*equally to be divided*) make a *Tenancy in Common.*

Ratcliffe's *Caſe*, 3 Rep. 40.

Joinder in Action by Executors.

7H.6. 35.

SOME of the Year-Books tell us, That if there are three Executors, and one ſells the Goods, he alone ſhall have the Action, becauſe 'tis upon his own Contract; but if there is a Debt due to the Teſtator, they muſt all join.

And one Executor or Adminiſtrator may join different Things in one Action, as where the Plaintiff nam'd herſelf Adminiſtratrix, and declar'd upon an *Indebitatus Aſſumpſit* to herſelf, and farther declar'd upon an *Inſimul computaſſet* to her as Adminiſtratrix, and concluded with a *Profert hic in Curia*, the Letters of Adminiſtration; upon

Curtis *verſus* Davies, 2Lev. 110.

Non

Non Aſſumpſit pleaded, and a general Verdict and entire Damages, it was mov'd in Arreſt of Judgment, that the firſt Promiſe muſt be intended *proprio Jure*, and the producing the Letters of Adminiſtration, was only to warrant the ſecond Promiſe, which muſt be *Jure Inteſtati*; but adjudg'd, That both might well be join'd in Declaration. *Twiſden contra.*

The like Judgment was given four Years afterwards, *viz. Anno* 30. *Car.* 2. that an Executor might ſue upon two Promiſes, the one made to himſelf, and the other to his Teſtator; but he could not be ſued with another jointly, becauſe one is to be charged *de Bonis Teſtatoris*, and the other *de Bonis Propriis.* Hall *verſus* Huffam, 2 Lev. 228.

Iſſues and Profits, Deviſe thereof.

BY a Deviſe of all *the Profits*, the Lands in *Reverſion* as well as in Poſſeſſion, do paſs. Cro. Eliz. 159.

So by a Deviſe of the *Iſſues and Profits*, the Deviſee hath an Intereſt in the Land. Parker *verſus* Plumer

Deviſe to one for Life, Remainder to *R. B.* and his Heirs paying ſo much out of the *Iſſues and Profits*, the Remainder Man dies, his Son and Heir within Age, and ſo in Ward to the Queen, and nothing paid in all that Time; adjudg'd, That ſince the Sum was to be paid out of the *Iſſues and Profits* of the Land, it muſt be intended when he ſhall receive it. Cro. Eliz. 190.

See *Poſtea Tit. Profits.*

Judgments by and againſt Executors.
See *Tit. plene adminiſtravit.*

Under this Title I ſhall mention,

(A.) *Judgments by Confeſſion pleaded to Actions brought againſt Executors.*
(B.) *Other Judgments pleaded by Executors.*
(C.) *Executor dying after Judgment, how, and againſt whom it ſhall be executed.*
(D.) *Notice of Judgment, where neceſſary.*
(E.) *Of* Sei' Fa' *and* Fi' Fa' *where they lie, and where not.*

See Feme-Covert 335.

(A.) ADjudg'd, That if an Executor ſuffer Judgment to go againſt him by Default, he ſhall not, upon executing the Writ of Inquiry, give in Evidence want of Aſſets, for he is eſtopped as to that; he ſhould have pleaded *plene adminiſtravit*, or ſpecially what Aſſets he had.

Trevil *verſus* Edwards, Mod. *Caſes* 308.

If an Action of Debt is brought *againſt an Executor*, he may plead, that pending that Suit, *R. B.* brought another Action againſt him for 100 *l. pro vero & juſto Debito* owing by the Teſtator, and that he had *confeſſed* the Action, and had not Aſſets *ultra* to ſatisfy that Judgment. The Plaintiff may reply *proteſtando*, that it was not a true Debt, and *pro pl'ito*, he may ſay, that the Judgment was confeſs'd by Covin to defeat him of his Action; but ſuch Replication is not good, becauſe the Plaintiff ought to anſwer that Part of the Plea that it was a *true Debt*, which was expreſly alledg'd by the Defendant in his Plea; and if that is true, the Judgment could not be confeſs'd by *Covin:* But the latter Caſes are, that the Defendant need not alledge that the Bond

Green *verſus* Wilcox, Cro. Eliz. 462.

Robinſon *verſus* Corbett, 1 Lut. 662.

was

was made, or the Judgment obtain'd *pro vero & juſto Debito*, for that ſhall be preſum'd.

An Action was brought *againſt the Adminiſtrator* upon a Promiſe of the Inteſtate, who pleaded in Bar a Judgment obtain'd againſt him, for a Debt on *Simple Contract*, *ultra quod*, he had not Aſſets, and did not aver, that the Judgment was *pro vero & juſto Debito*; adjudg'd, That was not a neceſſary Part of the Bar, but it ought to be alledg'd in the Replication, if the Plaintiff will take any Advantage of it. Palmer *verſus* Lawſon, 1 Sid. 332. 1 Lev. 200.

Adjudg'd, That where an Action is brought againſt Executors for a juſt Debt, and they appear; in ſuch Caſe the Plaintiff may move the Court, that they may plead the ſame Term, if he fears they will *confeſs a Judgment* to another, to defeat the Plaintiff of his juſt Debt; whereas, by the Courſe of the Court, he might imparle to the next Term. 1 Bulſt. 123.

Debt *againſt an Executor* for 100*l.* brought in the *Common Pleas*, and another Action was brought *againſt him* for 100*l.* in the *King's Bench*; he confeſs'd Judgment in the laſt Action, which he pleaded in Bar to the firſt, and that *plene adminiſtravit* all but the ſaid 100*l.* It was the Opinion of ſome Judges, that this was a good Plea, becauſe he is bound by Law to ſatisfy the firſt Judgment; but the better Opinion at that Time was otherwiſe, *viz.* That he ought to plead to the ſecond Action, that there is another depending againſt him, and that if he confeſs the ſecond, 'tis a *Devaſtavit*; for by the firſt Proceſs the Goods are ſo attach'd in his Hands, that he ought to anſwer that Action. Moor 173.

But ſince, it hath been otherwiſe adjudg'd, *viz.* that if *two Perſons* bring ſeveral Actions *againſt an Executor*, he may confeſs the Action, and give Judgment to him who brought the laſt Action, Searle's *Caſe*, Moor 678.

and ſo pleaſure his Friend, if it is done without Fraud.

Brown verſus Purchas, 1 Sid. 230.

(B.) *So where Debt was brought upon a Bond againſt an Executor*, who pleaded that *R.B.* had a Judgment againſt him for ſo much, *ultra quod*, he had not Aſſets, which Judgment was in Force. And upon Demurrer the Plea was held good, tho' the Defendant did not ſet forth for or upon what the Judgment was obtain'd; for if it had been upon *Simple Contract* without Notice of the *Bond*, it had been good.

Edgcomb verſus Dee, Vaugh. 89

Indebitatus Aſſumpſit was brought *againſt an Adminiſtrator* upon a Simple Contract of the Inteſtate. The Defendant pleaded Payment of ſeveral Debts in Bills and Bonds, and that he was likewiſe indebted by Recognizance ſtill unpaid, and alſo to *Allington* in 2670 *l.* who after the Plaintiff's Writ, brought an Action of Debt in the *Lord Mayor's Court*, againſt the now Defendant, on the Promiſe of the Inteſtate, *taliterque proceſſum fuit*, that he had Judgment, and that the Defendant paid the Money in Satisfaction of that Judgment; then he pleaded ſeveral Judgments in Actions of Debt without Specialities, and all paid except one of 7000 *l.* to *Cornwallis*; then he pleaded *plene Adminiſtravit*, all the Goods of the Inteſtate, and that he never had any of his Goods *præterquam*, to the Value of the ſeveral Sums by him paid, in diſcharge of the Judgments, Bonds, and Bills, and beſides, other Goods to the Value of 10 *s.* which are charg'd to *Cornwallis*'s Judgment. And upon Demurrer my Lord *Vaughan* held this is a good Plea to the Action; for tho' the Adminiſtrator might have demurr'd to *Allington*'s Action, and demanded Judgment of the Writ which he had Power to do, becauſe he is not chargeable at Common Law in an Action of Debt on a Simple Contract of the Teſtator, yet he had an equal Power

not

not to abate the Writ; and therefore may lawfully confeſs the Action, and give Way to the Judgment if there is no Fraud, although he hath Notice of a former Action depending.

'Tis true, this was formerly made a Queſtion, as before mention'd; but ſince that Time the Law is ſettled, *viz.* that a Judgment confeſs'd in the laſt Action, may be pleaded in Bar to the firſt, and that it is a *Devaſtavit* to pay a Debt upon a *Bond* before ſuch a *Judgment*, unleſs there are Aſſets to pay both; neither ſhall ſuch a Judgment be ever arreſted on a Motion, or revers'd by a Writ of Error meerly for that Cauſe. Moor 173.

Debt againſt an Adminiſtrator, who pleaded, that a Judgment was had againſt him in *London* in an Action of Debt, and that he had no Aſſets *præter* to ſatisfy that Judgment. The Plaintiff reply'd, and confeſs'd that ſuch Judgment was had againſt the Defendant; but that before this Action brought, the Plaintiff in that Action had acknowledg'd Satisfaction on Record; and upon Demurrer to this Replication the Plaintiff had Judgment, becauſe Satisfaction being acknowledg'd, the Defendant cannot plead that he had not Aſſets *præter* to ſatisfy that Judgment, becauſe the Judgment was already ſatisfy'd. Hampton *verſus* Bartholomew M 41 Eliz. Cro. Eliz. 726.

Debt *againſt an Executor*, who pleaded a *Statute* enter'd into by the Teſtator for 3000 *l.* and doth not ſay it was *pro vero & juſto Debito*; and upon Demurrer, this was held an ill Plea, becauſe it might be for performing of Covenants; and if ſuch Covenants are not broken, 'tis no Bar. * Mill *verſus* Sherfield, 2 Cro. 102. Philips *verſus* Echard, 2 Cro. 8. Wodell *verſus* Hungate, 2 Cro. 182.

Debt *againſt an Executor* who pleaded † *three Judgments, prout patet per recordum*, and that he had not Aſſets to ſatisfy thoſe Judgments; and upon Demurrer the Plea was held ill; for he doth not ſay, *prout patet per ſeperalia records*, neither did *See* antea. 363. † Samms *verſus* Mercer, 2 Cro. 625.

did he ſhew how much he had in his Hands to ſatisfy the Judgments, nor that they were *pro veris & juſtis Debitis.*

‖ Turner's *Caſe*, 8 Rep. 132.

Debt *againſt an* ‖ *Adminiſtrator*, who pleaded ſeveral Judgments amounting to 514 *l.* recover'd againſt him, and that he had not Goods of the Inteſtate *in manibus ſuis adminiſtrand' præterquam Bona & Catalla quæ* ** *non attingunt de Valentiam præd'* 514 *l. verſus ipſum in forma præd' recuperat.* The Plaintiff reply'd, That one was had by Covin, and that the other Judgment Creditor had accepted a †† Compoſition in Part of his Debt, and that the Defendant delay'd to take a Releaſe of him; adjudg'd for the Plaintiff; for nothing ſhall be accounted adminiſter'd but what was actually paid by the Compoſition, and that the converting any Part to his Uſe, and the neglecting to take a Releaſe, is againſt his Duty as Executor.

** *This is uncertain, for every leſs Sum than* 514 *l.* non attingit *to pay it, and ſo is a Plea that he hath not Aſſets* ultra

†† Veal *verſus* Gateſden, W. Jones 91 S. P.

So where Debt was brought *againſt an Executor*, who pleaded ſeveral Judgments amounting ſeverally to ſo much, and that he had fully adminiſter'd, and had no Goods of the Teſtator, *tempore Mortis ſuæ in Manibus ſuis adminiſtrand' nec habuit die impetrationis brevis originalis præd' nec unquam poſteá præterquam Bona & Catalla ad Valentiam* of the ſeveral Judgments; and afterwards he ſays, *præterquam Bona & Catalla quæ non ſufficientia ſunt ad ſatisfaciend'* the ſeveral Judgments, which is a meer Contradiction: Beſides, this laſt Part of the Plea is uncertain; for he ought to plead, *præterquam Bona & Catalla ad Valentiam* of the ſeveral Judgments, and ſo confeſs that he had ſufficient to ſatisfy them; or if he had not enough, then he ought to ſay, *præterquam Bona & Catalla ad Valentiam* of a certain Sum, and *non ultra quæ eiſdem Debitis obligat onerabilia exiſtunt.*

Meriell Treſham's *Caſe*, 9 Rep. 108. 1 Roll. Abr. 922. Winch Ent. 177.

And

And ſo it is in *Vaughan*, *præterquam Bona & Catalla ſufficientia*, to ſatisfy the Judgments and Statutes, and aver they are not ſatisfy'd, and that the Goods are chargeable with the ſaid Judgments; and then the Plaintiff muſt reply, That he hath Aſſets *ultra* to ſatisfy the ſame. Vaugh. 103.

Debt againſt an Executor, who pleaded ſeveral Judgments, *&c.* The Plaintiff reply'd to every one of them *obtent' per fraudem*, and this is the beſt Courſe; for if he reply, That *ſeperalia Judicia* were obtain'd by Fraud, if one is found to be a true Debt, it will be againſt him. 1 Mod. 33.

Debt *againſt an Adminiſtrator*, who pleaded two Recognizances acknowledg'd by the Inteſtate which were not ſatisfy'd, and that he had not Goods or Chattels of the Inteſtate *præterquam Bona & Catalla*, which did amount to what was due on the ſaid Recognizances; adjudg'd, this was not a good Plea; for he ought to have pleaded that he had not Goods *præterquam Bona*, to ſatisfy the two Recognizances, or no Goods beyond ſuch a Value, which did not amount to the Sums due on the Statutes. Charnock *verſus* Coney, 2 Brownl. 118, 153.

So where Debt was brought *againſt an Executor* for 100*l.* he pleaded, that *R. B.* had recover'd 19*l.* of him for Rent, *ultra quod*, he had not Aſſets; and upon Demurrer this was held an ill Plea; for he ought to have pleaded, that *R. B.* had recover'd 19*l.* of him for Rent, and that he had not Aſſets, but to ſo much, and *ſhew the Sum certain* to ſatisfy the Debt of 19*l.* *ultra quod* he had not Aſſets. But *Levintz* tells us, this is but Form, and had been good upon a general Demurrer; but this was a ſpecial Demurrer, and therefore it was held ill. Davage *verſus* Davage, 1 Sid. 210. 1 Lev. 132.

So *Aſſumpſit againſt an Executor* upon the Promiſe of his Teſtator, he pleaded a Recognizance, and ſeveral Judgments, and Payment of them, and that Jefferies *verſus* Dee, 1 Lev. 281.

that he had no Goods *præterquam Bona & Catalla ad valentiam* of the ſeveral Sums paid on the ſaid Judgments, *& præterquam Bona* to the Value of 5 *l. quæ onerat' exiſtunt*, and are not ſufficient to ſatisfy the Recognizance. The Plaintiff reply'd, *Proteſtando*, that the Judgments were had by Fraud and Covin, and *pro placito* that the Defendant did not pay the Money on a Judgment to one of them, nor the Money on a Judgment to another, and ſo to the reſt *& de hoc ponit ſe ſuper patriam*, and as to the Recognizance, that it was ſatisfy'd and kept on Foot by Fraud. And upon Demurrer to the Replication it was objected, That it was double and manifold, putting too many Things in Iſſue, when one would have ſerv'd; but adjudg'd, That the Replication was good, for the Plaintiff had his Election to traverſe *all* or any of the Judgments; and it was his beſt Courſe to traverſe *all*, becauſe he might be miſtaken in one.

Warcup *verſus* Simonds, Cart. 221.

Debt *againſt an Executor* who pleaded ſeveral Judgments, and that he had not Aſſets *ultra*, *&c.* The Plaintiff reply'd, That they were kept on Foot by Fraud. The Defendant rejoin'd, That he did not keep them on Foot by Fraud. And upon Demurrer to this Rejoinder it was held ill, becauſe he did not ſay, that he did not keep them *or any of them* on Foot by Fraud, which my Lord *Vaughan* held to be a Negative pregnant. Though where Infancy was pleaded to an *Aſſumpſit* for Wares ſold and deliver'd, the Plaintiff reply'd, it was for Neceſſaries; and the Defendant rejoin'd, that *the Goods* deliver'd were not for Neceſſaries: Upon Demurrer to this Rejoinder, the like Exception was taken, *viz.* that the Goods *or any Part thereof* were not for Neceſſaries, yet the Exception was diſallow'd; for if any Part of it was

1 Lutw. 241.

for

for Neceſſaries, it ought to be ſhew'd on the other Side.

Debt *againſt an Executor* upon a Bond of the Teſtator. The Defendant pleaded two Judgments obtain'd againſt his Teſtator and ſet them forth, and that he had not Aſſets *ultra* 40 *s.* to ſatisfy both the ſaid Judgments. The Plaintiff reply'd, That ſo much was paid on one Judgment, and ſo much on another, and that they were kept on Foot by Fraud: And upon Demurrer to this Replication becauſe it was complicated, and no diſtinct Iſſue could be taken; for the Plaintiff had put both the Judgments together, by alledging *they were* kept on Foot by Fraud; yet it was adjudg'd well enough. Maſon *verſus* Stratton, 2 Mod. 36.

Debt *againſt an Adminiſtrator*, who pleaded a Recognizance not ſatisfy'd, and a Judgment in Debt for 5000 *l.* on a Note payable *with Intereſt* on Demand, and that the ſame being not ſatisfy'd till ſuch a Day, *the Intereſt amounted to* 700 *l.* and ſo Judgment againſt him for the Principal and *Intereſt*, mentioning the certain Sum, and that he had not Aſſets *ultra* 40 *l.* chargeable to this Recognizance and Judgment. And upon Demurrer to this Plea the Plaintiff had Judgment, becauſe the pleading the Judgment for *Intereſt* is a *Devaſtavit*, for the Defendant ought not to have ſuffer'd ſo much *Intereſt* to be in Arrear, and ſo Judgment was againſt him upon that Point; beſides, he ought to have pleaded a defect of Aſſets before the *Intereſt incurr'd*, and that being not pleaded, ſhall never be intended. Seaman *verſus* Dee, 2 Lev. 39.

Debt upon Bond *againſt an Executor* who pleaded ſeveral Judgments in *Bar*, *ultra quod* he had not Aſſets. The Plaintiff reply'd, That *placitum eſt minus ſufficient'*, *&c.* for that Satisfaction was acknowledg'd upon one of the Judgments, and that the other were kept on Foot by Fraud, *&* Hancock *verſus* Prowt, 1 Sid. 429.

hoc

hoc parat' eſt verificare, but doth not ſay *per recordum*. And upon Demurrer to this Replication it was held good, for *hoc parat' eſt verificare*, ſhall be taken reſpectively to the ſeveral Judgments, and that the Word *Placitum* takes in all; for all the Judgments make but one Plea in Bar.

Knighton *verſus* Morton, 3 Lev. 311.

Debt upon Bond *againſt an Executor*, who pleaded a Judgment againſt himſelf as Executor upon another Bond of the Teſtator, but did not conclude his Plea (as he ought) *prout patet per recordum*, and pleaded other Judgments well enough; and that *plene adminiſtravit omnia Bona Teſtatoris præter* 10 *s.* which was charged with the ſaid Judgments, and not ſufficient to ſatisfy them. The Plaintiff reply'd *Proteſtando*, that the Judgments were obtain'd by Fraud, *pro placito* he ſaid, that at the Time of the Writ brought, there was not more than 100 *l.* owing on all the Judgments, and that the Defendant had at that Time Aſſets ſufficient to pay all the Judgments, and the Debts due to the Plaintiff, and that he ſuffer'd the Judgments to remain in Force by Fraud. And upon a general Demurrer it was adjudg'd, That this Replication was good as to the general Way of pleading Aſſets ſufficient to ſatisfy all, but becauſe the Plaintiff had not laid *any Place* where the Defendant had *Aſſets*, this was held incurable; and though the Plea was ill, by not concluding as to the firſt Judgment *prout patet per recordum*, yet ſince the Plaintiff had not taken Advantage of it, but paſſed it over by his Replication, and had ſet forth other Matter to be try'd, *viz.* Aſſets at the Time of the Writ, that Fault was cur'd.

As to Replications in general, 'tis to be obſerv'd, that where an Executor pleads a Judgment, it muſt appear by the Replication, that ſome Aſſets remain in his Hands after all is ſatisfy'd; for

for until that appears, the Defendant hath done the Plaintiff no Injury; as if an Action of Debt is brought againſt an Executor, and he pleads a Judgment had againſt him for 200 *l.* and Execution iſſu'd, and another Judgment of 100 *l.* and travers'd that he had not Aſſets but to ſatisfy the Execution for 200 *l.* this was adjudg'd a good Plea, and that the Plaintiff muſt reply that he had Aſſets in his Hands, *ultra* the 200 *l.* and *ultra* the 100 *l.* for before that is ſatisfy'd the Plaintiff could not be entitled to his Debt.

And therefore, if any Part of ſuch Plea is not true, yet that can be no Reaſon why the Plaintiff ſhould have Judgment; for, as my Lord *Vaughan* calls it, 'tis a ſpungy Reaſon to ſay that the Plea is entire, and that if any Part of it is falſe, the Plaintiff muſt have Judgment; for if the falſeneſs is not material, nor any wiſe hurtful to the Plaintiff, or beneficial to the Defendant, why ſhould the Plaintiff have what he ought not to have, or the Defendant pay what is not his due. As for Inſtance, ſuppoſe the Defendant pleads ſeveral Judgments obtain'd againſt his Teſtator and himſelf, and that they were marry'd at the Time of ſuch Judgments obtain'd, which in Truth was not ſo, Should this Falſity cauſe the Plaintiff to recover? Certainly it would not. Vaugh. 104.

Debt againſt one as *Adminiſtrator* to *R. B.* he pleaded a Judgment obtain'd againſt him as *Executor* to *R. B.* and this was held good; and ſo it was many Years afterwards in a like Caſe, *viz.* Debt againſt two * *Executors*, who pleaded a Judgment had againſt one of them as *Adminiſtrator*; and upon Demurrer it was inſiſted, that they ought to have abated the Action, upon which the Judgment was had by their Plea, *viz.* That he was *Executor* and not *Adminiſtrator*; beſides, that Action was brought againſt one alone, when it ought Smalpeice *verſus* Smalpeice Cro. Eliz. 646. * Parker *verſus* Amys, 1 Lev. 261.

ought to be againſt both; but adjudg'd, That the Plea was good as to the firſt Objection, upon the Authority of *Smalpeice*'s Caſe before mention'd; for though the Action was not well brought, yet the Defendant was not oblig'd to plead in Abatement, and put himſelf to greater Charge, eſpecially ſince the Judgment was obtain'd for a true Debt.

Harvey *verſus* Harvey, Raim. 153.

Debt againſt an Executrix, who pleaded a Judgment obtain'd againſt the Teſtator, and one *Eraſmus Harvey* jointly, and that the ſaid *Harvey* was ſtill alive, and that ſhe had not Aſſets beyond that Judgment to ſatisfy the Debt; and upon Demurrer to this Plea, the Executrix had Judgment, becauſe the Charge ſurvives, and ſhe is not liable.

Ordway *verſus* Godfrey, Cro. Eliz. 575.

Harcourt *verſus* Wrenham, Moor 158. 1 Brownl. 76. S. C.

Judgment againſt the Inteſtate, and a *Sci' Fac'* againſt his Adminiſtrator, who plead *plene adminiſtravit*; and upon a Demurrer, (but it doth not appear whether a *General or Special* Demurrer) it was adjudg'd no good Plea to a Charge upon a Judgment; for it ſuppoſeth the Goods came to his Hands, which he adminiſter'd, and that he might do by Payment of Debts of inferior Nature to Judgments.

† Perchet *verſus* Woolſton, Allen 47.

But † *Anno* 23 *Car.* my Lord *Rolls* was of another Opinion, and ſo was my Lord *Anderſon* in the Caſe of *Ordway*, for he ſaid, there is not any Priority of Debts on Record, unleſs in the Caſe of the Queen.

‖ Newton *verſus* Richards, 4 Mod. 296 1 Salk. 296. S. C.

And *Trin.* 6 *Will'i*, ‖ *Holt*, Chief Juſtice, held the Plea to be good on a general Demurrer, and that the beſt pleading was to ſhew, that no Goods came to his Hands except ſuch; and then to ſhew how he adminiſtred.

(C.) *As to an Executor's dying after Judgment, in ſuch Caſe, his Executor cannot ſue Execution upon that Judgment, for no Body can do it, but he who is*

ſubject

ſubject to pay the Debts of the firſt Teſtator, which ſuch an Executor is not. And this my Lord *Coke* deliver'd for Law in † *Brudenell's* Caſe; but two Years afterwards, in the Caſe of *Perkins* and *Clarke* the Court doubted of it, and therefore would deliver no Opinion.

† 5 Rep. 9 b. Perkyns verſus Clarke, Cro. Eliz. 335.

But the true Reaſon is, becauſe the ‖ Recovery by the firſt Executor is in *auter droit*, and not to his own Uſe; for it doth not make it a proper Debt to him, but it remains due to the Teſtator, and to him who ſhall afterwards adminiſter; ſo that the firſt Executor being dead, the Suit is determin'd, and ſhall not be reviv'd by any but by him who comes in that Right.

26 H. 8. 7. *See* Statute 8 & 9 Will'i cap. 11. ‖ Beaumont *verſus* Long, W. Jones 248. 1 Rolls 889. Cro. Car. 227. Yel. 33. Moor 680. 2 Cro. 4.

So where an Adminiſtrator brought an Action of Debt for a Debt due to the Inteſtate, and had Judgment, and before Execution dy'd Inteſtate, his Adminiſtrator cannot have a *Sci' Fac'* upon that Judgment, for want of Privity between one Adminiſtrator and another. The *Sci' Fac'* is grounded on a Record; and he who will have an Action upon ſuch Record, muſt make himſelf privy to him who is a Party to the Record, which one Adminiſtrator cannot do to another; for the laſt Adminiſtrator doth not claim under the Authority of the firſt, but by Virtue of a Commiſſion from the Ordinary.

And not many Years before it was held, that if Judgment is had againſt an Executor, and a *Fi' Fac'* awarded; but before it was executed he dy'd Inteſtate, and Adminiſtration was committed to the Plaintiff, who brought an Action againſt the Defendant for taking the Goods by Virtue of the Sheriff's Warrant; and it was objected that it was illegal, becauſe the Plaintiff was Adminiſtrator, and the Judgment was not obtain'd againſt him, and therefore a new Proceſs

Parkes verſus Moſſe, Cro. Eliz. 181. Moor 352. 1 Leon. 144

ceſs ought to be awarded, *viz.* a *Sci' Fac'* to ſhew Cauſe why the Defendant ſhould not have Execution; but adjudg'd, That the Property of the Goods was bound from the Time of the *Teſte* of the Writ of *Fi' Fac'*, and that notwithſtanding the Death of the Executor, the Sheriff might execute the Writ on the Goods in the Hands of his Adminiſtrator.

Norgate, *verſus* Snape Cro. Car. 167. W. Jones 214.

So where Judgment was had againſt an *Executor* upon a Bond of the *Teſtator*, and before Execution he *died* Inteſtate, and Adminiſtration of the Goods of the *Executor*, and alſo *de Bonis non, &c.* of the *Teſtator* was granted to the Defendant, againſt whom the Plaintiff, who had obtain'd the Judgment, brought a *Sci' Fac'* as Adminiſtrator to the firſt *Teſtator*, and alſo to the *Executor*, and this was to ſhew Cauſe why he ſhould not have Execution. The Defendant pleaded *plene adminiſtravit*, the Goods of both. The Plaintiff reply'd, That he had Aſſets of the firſt Teſtator, and ſo it was found; adjudg'd, that it was well brought, for though where an *Executor* hath a Judment, and dieth Inteſtate, his *Adminiſtrator* ſhall not have a *Sci' Fac'*; yet where Judgment is had *againſt an Executor*, for a Debt owing by the *Teſtator*, and he dies Inteſtate, ſuch Judgment may be executed by a *Sci' Fac'* againſt the *Adminiſtrator de Bonis non, &c.* of the firſt Teſtator, becauſe he ſtands in the Place of the Executor.

Harriſon *verſus* Bowden, 1 Sid. 29.

An *Executor* was Plaintiff and had Judgment, and brought an *Elegit*, and before the Debt was levy'd he *died* Inteſtate; the *Adminiſtrator de Bonis non* ſhall have the Advantage of this Judgment, becauſe by taking out the *Elegit*, the Intereſt was veſted; but 'tis otherwiſe, if the Execution had not been actually taken out.

And

And ſo it was adjudg'd many Years before, *viz.* That an *Adminiſtrator* ſhall have the Benefit of a Judgment obtain'd by an *Executor*, if ſuch Executor do proceed to *Execution* in his Life-time; as if he take out an *Elegit* on the Judgment, or an *Extent* or *Liberate* upon a Statute, and die Inteſtate before ſuch Writs are actually executed; but if it had been executed, then the *Adminiſtrator de Bonis non* of the firſt Teſtator ſhall have the Benefit, becauſe 'tis a Chattel veſted in his Right. Cleve *verſus* Veer, W. Jones 385. Cro. Car.

By a late Statute 'tis enacted, That the *Death of either Party between the Verdict and Judgment ſhall not be alledg'd for Error, ſo as the Judgment is enter'd within two Terms after the Verdict.* 17 Car. 2. cap. 8.

After this Statute an Action was brought againſt the Teſtator, which was try'd at the Summer Aſſizes, and the Plaintiff had a Verdict; but before the firſt Day of *Michaelmas* Term the Teſtator dy'd. Afterwards in that Term Judgment was entred by Virtue of the Statute, and a *Sci' Fac'* was brought againſt the Executor, who pleaded, that the Teſtator owed him 100*l.* on Bond; and farther pleaded, That my Lord *Arlington* had obtain'd a Judgment againſt him, and that he had not Aſſets *ultra* 40*l.* which he retain'd to ſatisfy himſelf, and to diſcharge that Judgment. The Queſtion was, Whether the Judgment now enter'd, ſhall be made a Judgment againſt the Teſtator in his Life-time by the Help of this Statute; if ſo, 'tis to be paid before a Debt due on a Bond, and whether a Judgment upon which no *Sci' Fac'* was ſued, ſhall be pleadable to a Judgment on which there is a *Sci' Fac'* ſued. Juſtice *Twiſden* was of Opinion, That the Intent of the Act was to make the Judgment good, and that it was not to be avoided by alledging the Death of either Party for Error, and that it was not to extend the Judgment itſelf any farther than Wheatly *verſus* Lane, 1 Sand. 216. 1 Sid. 397. 1 Lev. 250, 231, 255.

it was at Common Law, which is only from the Time of the Entry; but this would make it relate to the Time of the Verdict given, and make it alſo a Judgment againſt the dead Man, as if he was actually living, and that it would be ſuch a *Fictio Juris*, as would be a certain Prejudice to the Defendant to defeat him of a juſt Debt due on a Bond, and a Debt of a ſuperior Degree, to a Debt upon Simple Contract before this Judgment was enter'd. But my Lord *Hales* was of another Opinion, That the Judgment ſhall relate to the Verdict, and that by the Help of the Statute, 'tis made a Judgment from that Time.

Farrow verſus Brooks, 1 Mod. 188.

Judgment againſt the Defendant, and a *Fi' Fac' de Bonis & Catallis, &c.* before the Execution of the Writ, the Defendant died Inteſtate; the Adminiſtration being granted to his Wife, the Writ was executed upon his Goods in her Hands, and held good without ſuing forth a *Sci' Fac'*, becauſe the Property of the Goods was bound by the *Teſte* of the *Fi' Fac'*, ſo that a Sale made of them *Bona fide* could not be avoided; and ſince the Inteſtate himſelf could have no Plea to the *Fi' Fac'*, Care ſhall not be taken of his Adminiſtratrix to let her in to any Advantage to plead a *Sci' Fac'*; but this was againſt the Opinion of my Lord *Vaughan*.

(D.) *As to Notice of Judgments, it hath been ruled, and ſo is the Law, that an Executor is not bound to take Notice of a Judgment againſt his Teſtator*, becauſe he is not privy to his Acts; and though a Judgment is Matter of Record, yet that makes no Alteration in the Caſe; for an Executor is no more bound to take Notice of a Record, than the Court in which 'tis recorded, who are not bound to take Notice of their own Records after the firſt Term; and by the ſame Reaſon, an Executor ſhall not take Notice of ſuch Judgment at his own

own Peril, but he ought to have Notice given; and this appears by the Caſes following:

ſſ. Debtor by *Bond* and alſo by *Recognizance*, Judgment was had upon the *Bond*, and before Execution the Obligor made his Wife Executrix, and *died*, then his Goods were taken in *Execution* upon the *Recognizance*. And afterwards, the *Bond* Creditor brought a *Sci' Fac'* againſt the Executrix, to ſhew Cauſe why he ſhould not have Execution on the Judgment; to which ſhe pleaded the Execution on the Recognizance; and it was held a good Plea, becauſe ſhe being chargeable with the juſt Debts of the Teſtator, and Execution being actually taken out for ſuch a Debt, ſhe could not prevent its being executed, eſpecially having *no Notice* of the Judgment on the Bond. 2 And. 157

But about three Years afterwards, the like Caſe happen'd again, where the Adminiſtratrix had *Notice* of a Judgment on the Bond, for ſhe brought a Writ of Error to reverſe it; and whilſt it was depending, the Inteſtate's Goods were taken in Execution upon a Recognizance; then the Judgment was affirm'd on the Writ of Error; and upon a *Sci' Fac'* brought, the Defendant pleaded the Execution on the Recognizance, and that ſhe had not *alia Bona*, *&c.* and the Plea was held good, though the Plaintiff had declar'd, that ſhe *had Notice* of the Judgment on the Bond: For when the Adminiſtratrix paid the Debt on the Recognizance, ſhe could not plead the Judgment on the Bond, becauſe, whilſt the Writ of Error was depending, ſhe could not tell whether it would be affirm'd or not. Bereblock *verſus* Read, Cro. Eliz. 734, 822. Yel. 29. 2 And. 160 2 Brownl. 39, 81. Co. Ent. 152. *b.*

(E.) *In ſome Caſes a* Sci' Fac' *lieth, and in ſome not; upon a Judgment againſt an Executor the Caſes where it lieth not, are as follow:*

Aldworth *verſus* Peel, Cro. Eliz. 530. 2 And. 55.

ſſ. The Plaintiff had Judgment againſt an Executor to recover *de Bonis Teſtatoris*, and upon a *Sci' Fac'* the Sheriff return'd *nulla Bona Teſtatoris*; thereupon the Plaintiff ſuggeſted, That the Executor had waſted the Goods, and brought a *Sci' Fac'* againſt him to ſhew Canſe why he ſhould not have Execution *de Bonis Propriis*, to which the Executor demurr'd; for ſuch a *Sci' Fac'* will not lie upon the Suggeſtion of the Party, nor without the Sheriff had return'd a *Devaſtavit*. My Lord *Anderſon*, who reports this Caſe, tells us, the *Sci' Fac'* will not lie, becauſe it varies from the Judgment, for that was *de Bonis Teſtatoris*, and this is *de Bonis Propriis*.

Davis's *Caſe*, Moor 246.

So where an Executor pleaded *plene adminiſtravit*, and the Jury found Aſſets as to Part of the Debt, whereupon the Plaintiff had Judgment for ſo much; afterwards he ſuggeſted Aſſets to the Value of the Reſidue of the Debt, and brought a *Sci' Fac'* againſt the Executor; and adjudg'd that it did not lie, for the Judgment did not warrant it, he ought to bring a new Action of Debt.

Paſtell *verſus* Ward, Palm. 443. Latch. 140

‖ De Bonis non, &c. *of the firſt Teſtator.*

So where the Obligee dy'd Inteſtate, and his Adminiſtrator brought an Action of Debt on the Bond, and had Judgment, and then the Adminiſtrator dy'd Inteſtate, and ‖ Adminiſtration of his Goods was granted to the Plaintiff, who brought two *Sci' Fac'* on the Judgment, and upon two *Nichils* return'd, had Judgment: Now though this was irregular, it could not be ſet aſide upon Motion, for he ought not to have brought a *Sci' Fac'* upon the Judgment, but a new Action of Debt on the Bond.

Stiles 251. S. P.

* Levet *verſus* Lewknor, 1 And. 23.

†2Cro. 394 March 9.

An Executor recover'd a * Judgment for a Debt due to the Teſtator, and before Execution he dy'd Inteſtate, his Adminiſtrator cannot have a † *Sci' Fac'* upon this Judgment for want of Privity; for when

when the Executor dy'd Inteſtate, his Teſtator is alſo dead Inteſtate, ſo that the Judgment and Recovery is void. The like Point was adjudg'd between *Tate* and *Goſſe*. Moor 680 Yel. 33. 2 Cro. 4. *ante* 271.

ſſ. An Adminiſtratrix brought an Action of Debt for a Debt due to the Inteſtate, and had Judgment, and ſhe died Inteſtate. The Plaintiff took out Adminiſtration *de Bonis non* of the firſt Inteſtate, and brought a *Sci' Fac'* to have Execution of that Judgment; but adjudg'd, that it did not lie for want of Privity, he ought to bring a new Action of Debt, againſt the Opinion of *Gawdy*.

But where the *Defendant, againſt whom the Judgment is obtain'd, dies*, the Plaintiff may have a *Sci' Fac'* againſt his Executors, and againſt a Stranger who enter'd. Cook *verſus* Cook, 3 Lev. 100.

And ſo it was adjudg'd *Anno* 19 *Car.* 2. *viz.* Judgment in Ejectment. The Adminiſtrator brought a *Sci' Fac'* againſt the Tertenants, and againſt the Defendant, to ſhew Cauſe why he ſhould not have Execution. And upon Demurrer it was objected, That the *Sci' Fac'* did not lie againſt the Tertenants, but adjudg'd that it did lie. Cole *verſus* Terrenants *of* Skinner, 1 Sid. 317.

As to the Place where it muſt be brought, that muſt be in the ſame County where the Action is laid, upon which the Judgment was obtain'd; as where Judgment was had againſt an Adminiſtrator in an Action of Debt on a Bond laid in *Cumberland*, and the Plaintiff brought a *Sci' Fa'* on that Judgment in *Weſtmoreland*, and upon two *Nichils* return'd, had Judgment; but upon a Writ of Error that Judgment was revers'd, becauſe the *Sci' Fac'* muſt be brought in the ſame County where the Action was laid. Muſgrave *verſus* Wharton, Hob. 4. 2 Cro. Yel. 18.

Libel in the Spiritual Court for a Legacy. The Defendant pleaded, That *W. R.* had recover'd ſo much Loyd *verſus* Maddox, Moor 917.

much Money in an Action of Debt at Common Law, *ultra quod* he had not Aſſets. The Plaintiff reply'd, That the Recovery was by Fraud and Covin; and that *W. R.* who had recover'd againſt the Defendant, offer'd to diſcharge the Judgment; but he (the Defendant) would not accept the Releaſe. Thereupon the Defendant mov'd for a Prohibition, ſuggeſting, that Covin was not examinable in the Spiritual Court; but the Prohibition was deny'd, and adjudg'd that it was examinable in that Court.

Jordan *verſus* Foſſert, 1 Vent. 76. 1 Sid. 449. S. C. 1 Mod. 50. S. C.

Error in *B. R.* to reverſe a Judgment in *C. B.* obtain'd againſt an Executor, who pleaded ſeveral Judgments had againſt him; and the laſt he pleaded thus, *viz.* That *W. R. in eadem Curia implacitaſſet, &c.* and had obtain'd Judgment in *Trinity* Term, but did not ſay in what Year; and upon a general Demurrer the Executor had Judgment in *C. B.* and now the Error aſſign'd was this, Uncertainty in Point of Time when the Judgment was recover'd; for if ſuch pleading ſhould be allow'd, it would be difficult for the Plaintiff to find out the Record, and it would bar him of the Plea that it was kept on Foot by Fraud.

Thompſon *verſus* Hunt, 3 Lev. 368.

Debt upon Bond againſt an Executor, who pleaded ſeveral Judgments obtain'd againſt him upon Bonds owing by his Teſtator, and that he had not Aſſets *ultra, &c.* The Plaintiff reply'd, as to one Bond of 200 *l.* the Condition was to pay 100 *l.* and no more, and ſo ſeverally to the reſt of the Bonds; and that the Defendant had Aſſets to pay the Plaintiff, and *ultra* to ſatisfy the leſſer Sums in the Conditions mention'd, *viz.* at ſuch a Place. The Defendant rejoins, that he had not Aſſets *ultra* to ſatisfy the *Debts and Judgments* ſet forth in his Plea; and upon a ſpecial Demurrer it was objected, that this Rejoinder was no direct Anſwer to the Replication, but very ambiguous;

ous; for he ſhould have rejoin'd, That he had not Aſſets *ultra* to *ſatisfy the leſſer Sums*, and not to make the Penalties of the Bonds Parcel of the Iſſue; but adjudg'd, That the Penalties are due Debts 'till the Obligees are ſatisfied; and by thoſe Penalties the Defendant ſhall protect himſelf againſt the Payment of any other Debt; unleſs the Plaintiff had reply'd ſpecially, that the Obligees would have accepted the leſſer Sums, but that the Defendant refus'd to pay them, and kept the Judgments on Foot by Fraud and Covin.

Debt againſt an Adminiſtrator on a Bond of 40 *l.* he pleaded that the Inteſtate was indebted to *W. R.* in 250 *l.* on a Statute-Merchant, yet in Force, and that he had not Aſſets *ultra* 40 *l.* to ſatisfy that Statute. The Plaintiff reply'd, That the Roll was burnt; and upon a Demurrer to this Replication three Judges held, that the Replication was good, becauſe by the Demurrer the Defendant had admitted that the Roll was burnt; and if ſo, it could never riſe up in Judgment againſt him, becauſe by the Act 23 *H.* 8. *cap.* 6. Execution is to be made *on Statutes-Staple* in ſuch Manner as therein provided; and the Statute-Staple refers to the Statute-Merchant, and that to the Statute of *Acton Burnell*, *Anno* 13 *Ed.* 1. by which 'tis enacted, That if it is *found by the Roll* that the Debt was acknowledg'd, and the *Day of Payment paſt*, that then, *&c.* Now if the Roll is burnt, it cannot appear that the *Day of Payment is paſt*, and by Conſequence there cannot be any Execution; beſides, the Cognizee in pleading muſt ſay *hic in Curia prolat*, which is now become impoſſible; but *Vaughan*, *Chief Juſtice*, held the Plea good, and the Replication ill; for admitting the Roll was burnt, the Plaintiff cannot avoid it by ſuch Replication, for 'tis againſt a Rule in Law,

Buckley *verſus* Howard, 1 Mod. 186

that a Matter of Record ſhall be avoided by Matter of Fact, 'tis a Caſe proper for Equity.

Bell *verſus* Bolton, 1 Lutw. 445.

Debt againſt an Adminiſtrator on a Bill penal enter'd into by the Inteſtate. The Defendant pleaded in Bar ſeveral Judgments obtain'd againſt himſelf as Adminiſtrator, upon the Bonds of the Inteſtate, amounting to 115*l.* and that he had fully adminiſter'd *præterquam* 10*l.* which was not ſufficient to ſatisfy the ſaid Judgments. There was an ill Replication, and a Demurrer to it, and it was objected that the Plea was ill, becauſe the Defendant had pleaded ſeveral *Judgments* without ſhewing that *they were not ſatisfy'd*, and this was held a good Exception.

Clerke *verſus* Withers, 1 Salk. 322

An Adminiſtrator got Judgment by default againſt one *Clerke*, upon a Bond given to the Inteſtate, and deliver'd a *Fi' Fa'* to the Sheriff 1 *Aug.* who ſeiſed the Defendant's Goods, and about eight Days afterwards the Adminiſtrator dy'd, and the Sheriff returned that he had ſeiſed Goods to the Value, *&c.* but that they remain'd in his Hands for want of Buyers. Afterwards, *viz.* on the 29th of *September*, the Sheriff was remov'd; and the Defendant ſuppoſing that the Execution was abated by the Death of the Adminiſtrator, brought a *Sci' Fa'* againſt the old Sheriff to have Reſtitution of his Goods, for that the Property was not diveſted out of him by the Seiſure, becauſe the Execution was not perfected; but Judgment was given againſt him in *C. B.* and affirm'd in Error in *B. R.* 'tis true it was inſiſted, that the Execution was *abated by the Death of the Adminiſtrator*, and could never be perfected after his Death for want of Privity; not by the Executor of the dead Adminiſtrator, becauſe he himſelf came in *auter droit*; not by the Adminiſtrator *de Bonis non* of the firſt Inteſtate, becauſe he comes in Paramount the Judgment; but adjudg'd, That the

the Execution was not abated by the Death of the Administrator, but that the Sheriff might proceed, for he hath nothing more to do with the Administrator Plaintiff, because the Writ commands him to levy, *&c.* and to bring the Money into Court, and this is not hinder'd by the Death of the Administrator; but the old Sheriff is still compellable to do it, because an Execution is an entire Thing, and he who begins must end it. Therefore an *Administrator de bonis non*, may pursue an Execution thus begun, and this he may do by a *Distringas nuper vicecomitem*, *i. e.* that the new Sheriff shall distrein the old Sheriff to sell the Goods, and to bring the Money into Court, or to deliver it to the new Sheriff, which shews that his Authority continues by Virtue of the first Writ. That when the old Sheriff hath seised, he is compellable to return the Writ, and is liable to answer the Value therefore by such Seisure, the Property is divested out of the Defendant, and he is discharged, and no farther Remedy can be had against him. And lastly, since an Administrator *de Bonis non* may, by Virtue of the Statute 17 *Car.* 2. *cap.* 13. have an Execution upon a Judgment after a Verdict obtained by an Executor or Administrator, (tho' here it was by Default) yet 'tis reasonable, and within the Equity of the Statute, that he should be permitted to perfect an Execution thus begun, tho' the Statute doth not mention Executions, especially since the Right is now vested in him.

Debt upon Bond against an Executor, who pleaded six several Jugdments for 100 *l.* each of them, and that he had not Assets *ultra* 10 *l.* the Plaintiff replied severally as to five of the Judgments, that they were kept on Foot by Fraud, and in each Plea he pray'd Judgment for his Debt and Damages; and as to the sixth Judgment

Aston *versus* Sherman, 1 Salk. 298

ment he reply'd, That the Defendant had Aſſets *ultra* 10 *l.* and concluded to the Country; and upon a Demurrer to this Replication it was adjudged, That the Plaintiff might reply to each Judgment ſeverally; but that this Replication was ill, becauſe where the Defendant pleads *ſix Judgments*, he confeſſes Aſſets *for above five*; and if the Plaintiff in his Replication tenders an Iſſue that the Defendant had Aſſets *ultra* ſuch a Sum, 'tis ill, becauſe by his pleading *ſix Judgments*, he had confeſſed that before.

Rock *verſus* Leighton, 1 Salk. 310.

Whilſt an Action was depending againſt an Adminiſtrator, he ſuffered Judgment to be had againſt him by another, but did not plead that Judgment to the Action then depending, but ſold Part of the Inteſtate's Goods to ſatisfy that Judgment; afterwards the Plaintiff in the firſt Action got Judgment, and upon a *Fi' Fa'* to take the Goods in Execution; the Sheriff levied Part, and as to the reſt, he return'd a *Devaſtavit* by the Adminiſtrator; and upon an Action brought againſt him for a falſe Return, it was inſiſted for the Plaintiff, that the ſuffering Judgment to go by Default, pending the Action was no Confeſſion of Aſſets, and that the Sheriff ought not to have return'd a *Devaſtavit*, but *nulla Bona*, and ſo there ſhould be a *Scire Fieri* Inquiry; but adjudged, That he might return a *Devaſtavit*, and that the *Scire Fieri* Inquiry is for his Safety; that if an Executor ſuffers a Judgment to go by Default, or confeſſes it, he admits Aſſets; 'tis true, he might have pleaded ſuch Judgment, and *Riens ultra*, but not pleading it when he might, is an Admiſſion of Aſſets, as to the ſecond Judgment, and he is eſtopped to ſay the contrary upon a *Devaſtavit* return'd.

* Parker *verſus* Atfeild, 1 Salk. 311

* Debt upon a Bond againſt an Executor, who pleaded ſeveral Judgments *& nihil ultra* 5 *s. &c.*

the

the Plaintiff reply'd as to one Judgment, That there was but ſo much due, which the Creditor was willing and ready to accept in full, and that the Defendant kept it on Foot by Fraud; the like Reply to another Judgment, and as to the reſt, the Plaintiff demurr'd. The Defendant rejoined as to one Judgment, That it was not kept on Foot by Fraud; and as to the other, that he had not Aſſets *ultra*, *&c.* the like Rejoinder to another Judgment; and as to the reſt, he joined in Demurrer: Adjudged, That where an Executor pleads a Judgment with a Penalty, he ought to ſhew how much is really due; that where he pleads ſeveral Judgments, and one of them is found fraudulent, or ill pleaded, in ſuch Caſe the Plaintiff ſhall have Judgment, That pleading ſeveral Judgments is a Confeſſion of Aſſets as to all of them, and that the *nihil ultra* is only Matter of Form, and not traverſable: That where it appears the Creditor was willing to take leſs than is due, and the Debtor refuſes to pay it, this is Evidence of Fraud; but then, if it appears that the Adminiſtrator had not Aſſets to pay that Sum, 'tis no Fraud: That where an Adminiſtrator pleads one or more Judgments, and the Plaintiff confeſſes the Plea, and prays Judgment *quando* Aſſets *attiderint*, if Aſſets ſhould afterwards come to his Hands, he may ſatisfy the Judgments pleaded, becauſe the Judgment, when Aſſets ſhall happen, is to be diſcharg'd after the other Judgments: That the Concluſion of a Replication with *hoc paratus eſt verificare*, as to every Judgment, is well enough, but a general Concluſion as to all, had been better.

* *W. R.* brought an Action againſt an *Executor*, and had Judgment by Default, and a Writ of Inquiry, and then *W. R. died inteſtate*; and the Writ of Inquiry being abated by his *Death*, the Plaintiff

* Smith *verſus* Harman. 1 Salk. 315. *See* Burnet *verſus* Holden, *ante* 250.

Plaintiff got *Administration to* W. R. and brought a *Sci' Fac'* against the Defendant, to shew Cause why Damages should not be assessed, and recover'd against him; who pleaded, that this Administrator ought not to recover against him, because his (the Defendant's) Testator was indebted to *L. R.* in 100 *l.* upon Bond, who obtain'd Judgment against the said Testator; and that the Defendant (being his *Executor*) had not Assets *ultra*, *&c.* and upon a Demurrer to this Plea it was adjudged ill, because the * Statute which gives the *Scire Facias*, never intended that a Defendant Executor should make any other Defence than what his Testator might have done. Now, if a *Scire Facias* had been brought against such Testator, he could have pleaded nothing but a Release, or some other like Matter in Bar; for by the Words of the Statute, he is to shew Cause *why Damages shall not be recover'd and had against him*; and if he appears at the Return of the *Scire Facias*, and doth not shew any Matter to arrest the final Judgment, a Writ of Inquiry shall be awarded; therefore the Defendant, who is Executor, shall never plead a Judgment in Bar to a *Scire Facias* (as he hath done in this Case) brought against him upon an Interlocutory Judgment.

Trethewy *versus* Ackland, 2 Sand. 49. *See* Turner's *and* Tresham's *Cases.*

Assumpsit against an Administrator upon a Promise of the Intestate, to pay 418 *l.* for Goods sold and deliver'd; the Defendant pleaded several Judgments obtain'd against him, as Administrator upon Simple-Contracts, and avers, that the several Debts at the Time of the Intestate's Death, and

* 8. *and* 9. Will. cap. 11. *enacts, That if either Plaintiff or Defendant die after an Interlocutory, and before a final Judgment, his Executor or Administrator shall have a* Scire Facias *against the Defendant, if living, or against his Executor or Administrator, to shew Cause why Damages in such Case shall not be recover'd, &c. and if he appear, and shall not shew sufficient Cause to arrest the final Judgment, then a Writ of Enquiry shall be awarded.*

and at the Time of the Judgments obtained, were just and true Debts, and that the Judgments were in Force, and not satisfied, and that he had not Assets *ultra* those Judgments. The Plaintiff reply'd, That the Judgments were obtain'd by Fraud; and travers'd, that they were obtain'd for just and true Debts, and upon a special Demurrer to this Replication, it was objected, that it was double; for the Plaintiff having avoided the Judgments, by pleading that they were had by Fraud, ought to have rely'd on that, and then the Judgment against the Defendant would have been *de Bonis intestati*; but he hath perplexed the Matter with a *Traverse*, that they were obtained for just and true Debts, and so is *Beaumont*'s, in *Latch.* 111. But adjudged, That the Plaintiff shall have Liberty to traverse the special Matter, or to rely on the Fraud.

Judgment was had by *W. R.* against an Executor, afterwards *W. R.* died, and his Executor brought an Action of Debt upon that Judgment, suggesting a *Devastavit* made in the Life-time of *W. R.* his Testator, and the Plaintiff had Judgment in *C. B.* upon Default, and on a Writ of Error brought in *B. R.* it was objected, that the Plaintiff in this Action of Debt, was not privy to the Judgment had by his Testator against the Executor; and therefore he ought to have brought a *Scire Facias*, and have suggested a *Devestavit* according to *Wheatly* and *Lane*'s Case. (*Note*, There the Action was brought by the Party to the Judgment.) But adjudged, that the Executor of him to whom the Wrong was done, may bring an Action of Debt, but not against the Executor of him who did the Wrong. Now in the principal Case, the Wrong being done to the Property of the Plaintiff's Testator, by Consequence is vested in the Plaintiff to have a Recompence for

Berwick *versus* Andrews, 1 Salk. 314

1 Sand. 216.

for that Wrong, as Executor to him to whom it was done, and he is within the Equity of the Statute *de bonis aſportatis, &c.*

Britton verſus Bathurſt, 3 Lev. 113.

* By Confeſſion.

Scire Facias againſt the Defendant *Bathurſt*, as Adminiſtrator of *Mary Sachill*, againſt whom the Plaintiff had obtain'd a *Judgment of* * 1700 *l. as Adminiſtratrix to her Huſband* H. S. *de bonis pradict' H. S. ſi tant. &c. & ſi non, de bonis propriis*; and in this *Scire Facias* the Plaintiff did ſuggeſt, that *Mary the Adminiſtratrix* had Goods ſufficient of her Huſband *H. S.* but had *waſted them.* The Defendant *Bathurſt* pleaded, that *Mary the Adminiſtratrix* had fully adminiſter'd the Goods of her Huſband *H. S.* and travers'd the *Waſte, &c.* The Plaintiff in his Replication maintains the *Waſte*, upon which they were at Iſſue, and the Jury found *quoad* 314 l. *ſhe had waſted*; and farther, they find, that before her Marriage, *viz.* 2 *May*, *H. S.* her Huſband, covenanted with one *Norwood* to leave her 1000 *l.* at his Death, and gave Boud of 2000 *l.* condition'd to pay the ſame; that the Huſband afterwards died indebted to the Plaintiff in 1700 *l.* and that Adminiſtration of his Goods was granted to her, who 23 *October, &c.* was ſued by the Plaintiff, and he got Judgment againſt her. That this 1000 *l.* not being paid, the ſaid *Norwood* on the ſame 23d of *October*, brought an Action of Debt againſt her upon the ſaid Bond as Adminiſtratrix to her Huſband, and *obtained Judgment againſt her for* 2000 l. de Bonis *of her Huſband, ſi tant. &c.* and that ſhe, by the Conſent of *Norwood*, had 1000 *l.* left in her Hands of the Goods of her Huſband to ſatisfy the ſaid 1000 *l. &c.* Adjudged, That the Defendant *Bathurſt*, Adminiſtrator of the ſaid *Mary Sachill*, ſhall be charged with her Goods, to the Value of 1000 *l.* ſo left in her Hands for her own Uſe; becauſe ſhe, by confeſſing this Judgment of 1700 *l.*

to

to the Plaintiff, hath made herſelf liable; for ſhe might have pleaded the Bond of 2000 *l.* in Bar to the Debt of 1700 *l.* which was due to the Plaintiff by Contract only, which ſhe having omitted to do, ſhe ſhall be charged therewith as if her proper Debt, notwithſtanding the other Judgment recover'd againſt her by *Norwood*.

As to the Concluſion of the Writ of *Sci Fac'*, the Plaintiff, as Adminiſtrator, got Judgment on a *Sci' Fac'*, and it was moved in Arreſt of Judgment, that he had not concluded with a *profert hic in curia literas teſtamentarias*; but adjudged, That 'tis not the Courſe to ſet it forth in ſuch Writs which are founded on Records.

But ſince it hath been ruled, that the Plaintiff muſt conclude the Writ with a *profert hic in Curia, &c.* Boſworth *verſus* Ringale, 1 Shore 60.

Sometimes the *Return of a Sci' Fac'* is wrong, as where it was brought againſt an Executor with a *Fi' Fac'*, to levy the Debt and *Damages de Bonis Teſtatoris tantum, &c.* and if not, then the *Damages de Bonis Propriis*, the Sheriff returned *nulla Bona* as to the Executor, but that he had levied the *Damages* on the Teſtator's Goods; upon which another *Fi' Fac'* was brought, ſuggeſting a *Devaſtavit*; and the Sheriff returned, that the Executor had waſted the Teſtator's Goods, which was traverſed and tried, and a Verdict for the Plaintiff, but the Judgment was ſtaid; for the Return of the firſt Writ was naught, becauſe the Teſtator's Goods ought to be charged with the *Debt*, and not with the *Damages*, if there is not ſufficient to anſwer both; and the Damages are to be levied on the Goods of the Executor, for delaying the Payment of the Money: And tho' 'tis an Advantage to the Defendant to have the Damages levied on the Goods of the Teſtator; yet ſince all the Proceedings on the Record and Writ, are grounded Herne, *verſus* ——— 1 Lev. 75

grounded on the Return of the firſt Writ, which is naught, all the reſt is ſo likewiſe.

4 & 5 Will'i, cap. 20. 7 & 8 Will'i, cap. 26.

By a late Statute 'tis enacted, *That a Judgment not doggetted* (as required by that Act) *ſhall not effect any Purchaſer or Mortgagee, or have any Preference againſt the Heir, Executor, or Adminiſtrator, in the Adminiſtration of their Anceſtors, Teſtators, or Inteſtates Eſtates.*

Cook verſus Cook, 3 Lev. 120. 2 Lutw. 1268.

And as to the *Sci' Fac'*, if a Plaintiff obtain Judgment in Ejectment, and the Defendant *die*, he may have a *Sci' Fac'* againſt his Executors, and againſt a Stranger who had enter'd.

Kindred in the right Line deſcending.

THIS is a Word which comprehends all thoſe who are of Kin to the Deceaſed, and 'tis a Word of larger extent than *Agnati*, for that comprehends the Kindred only of the Male-Line deſcending, as *Cognati* doth of the Female-Line deſcending.

Mr. *Selden*, in his Treatiſe *de Succeſſionibus apud Hebræos*, tells us, That amongſt thoſe People the *Deſcent* was to all the *Sons*, but that the *Eldeſt* had a double Portion, *viz.* if there were three Sons, the eldeſt had two Fourths, and the other two had each of them a fourth Part.

That the *Daughters* never ſucceeded, if there were any Sons or Deſcendents from them; but if the Son died in the Life-time of his Father, leaving Iſſue a *Daughter* and no Son, that Daughter ſucceeded in his Part.

That if there was *no Son*, but only *Daughters*, in ſuch Caſe they ſucceeded equally Share and Share alike.

Amongſt the *Romans*, after various Alterations, at laſt it became a Law, That the *deſcending Line* took Place *in Infinitum*, but the Deſcent was equally

to

to all the Children, both Sons and Daughters, without any Preference of the *Males*; and if a Child died in the Life-time of his Father, leaving Iſſue a Son and Daughter, the Share which that Child ſhould have if it had been living, was equally divided between his Son and Daughter.

The remote Deſcendants ſucceeded *per Stirpes*, and not *per Capita*; that is, they had that Share amongſt them, which their reſpective Parents would have if they had been living.

In our Law, when our *Britiſh* Anceſtors were poſſeſs'd of this Land, their *eldeſt Sons* inherited their *Feuds* and *Baronies*, but conformable to the *Roman* Law, the ordinary Freeholds deſcended to all the Sons equally; and ſo it did in *Wales*, where the *Britains* were driven, which being conquered by *Ed.* 1. *Anno* 11. of his Reign, in the next Year *Statutum Walliæ* was made, by which this Cuſtom was confirmed, but the Uſage for *Baſtards* to inherit (as they did before,) was abrogated.

Amongſt our *Saxon* and *Daniſh* Anceſtors, the *Wife* had a Share of the Land for her Dower, and ſhe was to have a Part likewiſe of the Goods, but the Children all ſucceeded, as well to the *Feuds* as to the Lands, without any Preference of the Males; and ſo it continued to the Time of the *Normans*, as appears by the Laws made not long before by *Edward* the Confeſſor, confirmed by *William* the Conqueror, and recited by Mr. *Seldon* in his Notes upon *Eadmerus*, viz. *Si quis Inteſtatus obierit, liberi ejus hæreditatem equaliter dividant.* Lege 36 Pl. de Inteſtatorum Bonis, fol. 184.

But that Prince found it inconvenient to have Eſtates divided into ſo many Parts, becauſe it made younger Sons live upon little Parcels of Land, who might otherwiſe have been brought up in Trades, or might have applied themſelves to ſome Military or Eccleſiaſtical Employments,

and ſo become ſerviceable to the Publick, by enriching themſeves and the Kingdom; and he having got the Crown-Lands, and likewiſe the Eſtates of ſeveral Perſons who oppoſed him by joining with *Harold*, gave great Part thereof to the *Normans*, and to his particular Friends and Favourites, reſerving certain Honourary Tenures, either by *Baronage*, *Knight-Service*, or *Grand Serjeantry*, for the Defence of the Kingdom, and thoſe Tenures with the Lands deſcended to the *eldeſt Son*, except in *Kent*, where, tho' the Tenures deſcended to the eldeſt Son, yet the Lands went to all the Sons equally, which is called *Gavelkind*, and if ſuch Lands eſcheated or came to the Crown by Attainder, and were re-granted to be held by theſe Tenures, yet the cuſtomary Deſcent was not altered, for that was ſo fixed to the Land, that it could not be changed but by the *Legiſlature*.

So that tho' I do not find there was any poſitive Law to alter the Courſe of Deſcents, from all the Sons to the *Eldeſt*, yet by Degrees it obtained here, and in all Probability it was introduced by the Uſage of Deſcents of thoſe Honourary Tenures, except in *Kent*, and ſome other Places, for about 60 Years afterwards, *viz.* in the Reign of *H.* 2. the Law was, That Lands which were held in *Knights Service* deſcended to the *eldeſt Son*; and if there was no Son, then to the *Daughters equally*; and if neither Sons nor Daughters, then to the eldeſt Brother, and ſo on in the collateral Line.

And as to *Goods*, one Third Part was to the *Wife*, another Third Part for the *Children*, and the other to the Diſpoſal of the *Father*; but if no Wife, then one Moiety to the Children, and the other Moiety to the Diſpoſal of the Father.

'Tis

'Tis true, Lands which were held in *Socage* descended to *all the Sons equally*, only the Eldest was to have the Mansion-House; but in some Places the Youngest succeeded, this was by a particular Custom; for as to Lands held in *Knight's-Service* as aforesaid, the eldest Son succeeded where no Custom interposed.

But afterwards, in the Course of about seventy Years, *viz.* in the Reign of *Ed.* 1. the Law became settled, *viz.* that the *eldest Son* should succeed as well to *Lands* which were held in *Socage*, as in *Knights-Service*; and if the eldest Son died in the Life-time of his Father, leaving Issue a *Son*, or a *Daughter* and no Son, they succeeded, and not the Uncle.

I admit this was a Doubt in *Glanvill's* Time, who wrote in the Reign of *H.* 2. many Years before; but now it was no longer a Question, and so it hath continu'd ever since. Lib. 7. cap. 3.

Having given this short Account of Descent of Lands amongst us, I shall now proceed to shew the several Degrees of Kindred in our Law, and wherein the Civil Law agrees with ours.

There are three Degrees of Kindred in our Law.

(I.) *In the right Line descending, as from Father to Son.*

(II.) *In the right Line ascending, as from Father to Grandfather*, &c.

(III.) *In the Collateral Line, as to Uncles, Aunts, Great-Uncles*, &c.

And as to this Purpose 'tis always held, that the most *remote of Kindred in the Male Line descending*, shall be preferr'd before the neareſt of Kin in the *Female-Line*; but in the *Collateral-Line*

the *neareſt of Kin* takes Place as to the *Goods* of the Intestate.

Glanvill, Lib. 7. cap. 1. But as to his *Lands*, the Inheritance always deſcends in the right Line, or if there are no Kindred in that Line, then in the collateral Line, but never *aſcends* in the right Line upwards, tho' it may aſcend in the collateral Line.

Now in the right Line deſcending there is a Difference between a *Purchaſe* and a *Deſcent*; as for Inſtance, If a Son purchaſes Lands, and dies without Iſſue, it ſhall deſcend to the Heirs of the Part of his Father; and if there are none, then to the Heirs of the Part of his Mother, for he had both Bloods in him, and the *Conſanguinei* of the Mother are *Conſanguinei cognati* of the Son.

But if his Father had purchaſed Lands, and it had deſcended to the Son, and then he had died without Iſſue, and without Heirs of the Part of the Father, it ſhould never deſcend to the Heirs of the Part of the Mother, but rather Eſcheat, becauſe tho' the *Conſanguinei* of the Mother are *Conſanguinei cognati* of her Son, yet they are not ſo to the Father, who was the Purchaſer.

(1.) *The right Line deſcending is thus*, viz. *from the Father*,

(1.) To *Son*, or to the *Daughter* if no Son, and to *their Children*.

(2.) If none of them, then to *Nephew* or *Neice*. *&c.*

(3.) If none of them, then to *their Sons* or *Daughters*.

(4.) For want of them, to *Grandſon* or *Granddaughter* of the *Nephew* or *Neice*.

(5.) And if none of them, then to the *Great-Grandſon* of the *Nephew* and *Neice*, *& ſic in Infinitum*.

But

But in this Line the Children always ſucceed in the firſt Place, excluſive to the *Grandchildren*, if their Parents are living; but if they are dead, then the Grandchildren have a Share of the Goods with the living Uncle, *Jure repreſentationis*, but not *per Capita*; and the Reaſon is, becauſe they are not entitled in their own Right, but in the Right of their Anceſtor; therefore they are to ſhare *per Stirpes*, as proceeding from one common Root.

As for Inſtance, if the Father die Inteſtate leaving a *Son*, and ſeveral *Grandchildren* by *another Son* who dy'd before; in this Caſe his perſonal Eſtate ſhall be divided into two Parts, and the Son ſhall have a Moiety, and the other Moiety ſhall be diſtributed by equal Shares amongſt all the Grandchildren

And this Right of *Repreſentation* in the right *Line deſcending*, reaches beyond the Great-Grandchildren; but it muſt be underſtood of *Children* and *Grandchildren by the ſame Parents*; for if a Woman hath Children by two Huſbands, they ſhall ſeverally ſucceed to the Goods of their reſpective *Fathers*, but all of them equally to the Goods of their *Mother*; but if a Man hath two Wives, and Children and Goods by both, and then dies Inteſtate, living his Wife, all the Children by both Wives ſhall equally ſucceed to his Goods by the Civil Law.

(II.) *Kindred in the right Line aſcending.*

This Line is direct, *as from the Son*,
(1.) *To Father or Mother, if none*,
(2.) *To Grandfather or Grandmother, if none*,
(3.) *To Great Grandfather or Great Grand-mother*,

(4.) *To Great-Grandfather's Father, or Great-Grandmother's Mother,*

(5.) *To Great Grandfather's Grandfather, or Great-Grandmother's Grandmother,*

(6.) *To Great-Grandfather's Great Grandfather, or Great-Grandmother's Great-Grandmother,* & ſic in Infinitum, *this Line is likewiſe tranſverſal.*

Amongſt the *Jews*, if a Man dy'd without Iſſue, having a *Father* and *Brothers* ſurviving, his Land went not to the next *Brother*, unleſs he marry'd the Widow to raiſe up Children to his deceas'd Brother, but the Father ſucceeded.

And if the *Son* dy'd without Iſſue, and his *Father*, or any one deſcending from him *ſurvived*, it went not to the *Grandfather*; but if the *Father* was dead without Iſſue, then it went to the *Grandfather*, but never to the *Mother*.

Amongſt the *Romans*, if the Son dy'd without Iſſue, leaving a Father and Mother, and no Brother or Siſter, they both ſucceeded, and if only a Mother, and no Father, then ſhe ſucceeded.

But if he left both *Father* and *Mother*, and likewiſe a *Brother and Siſter*, or more of the whole Blood, they all equally ſucceeded without any Preference to the Males.

By the Civil Law, the *Father* and *Mother* are in the firſt Degree of Kindred in the *right Line aſcending*, and ſo it was in our Law after the Conqueſt; for if the *Son* dy'd without Iſſue, his *Father* or *Mother* ſucceeded; and if they were dead, then his *Brother or Siſter*; and if no ſuch, then his *Aunt* by the Father's Side, or Mother's Side; and ſo to the fifth Generation.

But *Glanvil* tells us, That in Purchaſes it was otherwiſe; for if a *Son* purchaſe Lands, and dies without Iſſue, his Father or Mother could not inherit,

herit, but his Brothers or Uncles and their Children; but if the Uncle enter after the Death of the Nephew, and die without Iſſue, in ſuch Caſe the Father ſhall inherit.

By which it appears, That the *Father* cannot ſucceed the *Son immediately*, though he is the next of Kin, for ſo he is moſt certainly; and therefore one would wonder that it ſhould ever be a Queſtion, Whether the *Mother* was of Kin to her Child? And it ſeems to be a greater Wonder, that it ſhould be adjudg'd ſhe was not, as it was in the famous Caſe of *Charles* Duke of *Suffolk*, *Anno* 5 *Ed.* 6. *viz.* he had a Daughter by the Queen Dowager of *France*, and a Son by his ſecond Wife, who was the Lord *Willoughby*'s Daughter, and he deviſed his Goods to his *Son*, and dy'd; and then the *Son* dy'd Inteſtate without Wife or Child, and his Mother adminiſter'd to him, which Adminiſtration was repealed in Favour to the Siſter of the half Blood, who was then marry'd to the Marqueſs of *Dorſet*; and it was adjudg'd, that the Mother was not of *Kin* to her *Son* for theſe Reaſons, ante 16.

(1) *For that as Lands, ſo likewiſe Goods cannot lineally aſcend*; therefore the Son is not of Kin to his Mother.

But this is a Conſequence which cannot be deduced from the Premiſſes; for if a Mother is not of Kin to her Son, becauſe ſhe cannot inherit his Lands, then the Son is no Kin to his Mother, when he is barred to ſucceed in her Inheritance, which no Body will affirm.

(2.) Another Reaſon was, *That though Children are of the Blood of their Parents, yet Parents are not of the Blood of their Children*; therefore the Mother is not of Kin to her Son.

If this is true, then one Brother cannot be of Kin to another; for though they are of the Blood

of their Parents, they are not of the Blood of each other.

(3.) The third Reaſon was, *That Father, Mother, and Son, though they are three diſtinct Perſons, yet they are but one Fleſh, and conſequently there is no Degree of Kindred between them.*

This is a Sophiſtical Reaſon, which deſtroys all Manner of Kindred between Parents and Children; for if a Son is not of Kin to his Father, becauſe they are both one Fleſh, for the ſame Reaſon a Father is no Kin to his Son.

Yet a Judgment founded on no better Reaſons prevail'd for ſome Time, and many Adminiſtrations were accordingly granted from the *Mother*, to the Brothers or Siſters as next of Kin, though 'tis the expreſs Text of *Littleton*, that the *Father* and *Mother* are nearer of Kin to the Child than the *Uncle*; and accordingly the Law now is, that the *Mother* is next of Kin to her Son, and ſhe hath the Right of Adminiſtration excluſive of all others.

But if there are ſeveral Parents of a diſtinct Line, and who are equal in Degree, but not in Number, they ſhall ſucceed according to the Stocks, and not *per Capita*; as for Inſtance, if the next of Kin is a *Grandfather* by the *Father's* Side, and *Grandfather* and *Grandmother* by the *Mother's* Side, the Grandfather by the Father's Side ſhall have *one Moiety*, and the Grandfather and Grandmother by the Mother's Side the other Moiety.

So if there is a *Brother* of the *whole Blood* living, and ſeveral Sons of another Brother of the whole Blood, and their Father dead, in ſuch Caſe the living Brother ſhall have one Moiety, and the other Moiety ſhall be equally divided amongſt the Sons of the dead Brother, for they ſhall have no more than the Share which their Father

ther ſhould have if he had been living; but the Grandfather of a Brother deceas'd, ſhall not be admitted to have any Share with the living Brother.

There were three Brothers, the middle Brother purchaſed Lands, and deviſed them to his Son in Tail; and if he ſhould die without Iſſue, that it ſhould remain to the next of Kin of the Lineage of the Teſtator; the elder Brother dy'd, leaving Iſſue a Son; and the Teſtator dy'd, and then his Son dy'd without Iſſue; adjudg'd, That the Son of elder Brother ſhall have the Land, for he is the next of the Lineage, (*i. e.*) in the lineal Deſcent. 19 *Eliz. Dyer* 333.

(III.) *The Collateral Line is of two Sorts.*

(1.) *The one deſcending by the Brother and his Children downwards.*

(2.) *The other aſcending by the Uncle upwards.*

Amongſt the *Jews*, if the Son dy'd without Iſſue after his Father, leaving Brothers, they ſucceeded equally as Heirs to the Father, and if no Brothers, then his Siſters ſucceeded.

Amongſt the *Romans*, if the Son dy'd without Iſſue, or any deſcending from them, and without Father or Mother, then the Brothers and Siſters of the whole Blood ſucceeded equally, and the immediate Children from them *per Stirpes*, without any Preference of the Male.

But if there was no Brother or Siſter of the *whole Blood*, nor any deſcending from them; in ſuch Caſe the Brothers and Siſters of the *half Blood* ſucceeded, and their Children, not *per Capita*, but *per Stirpes*; and if there were none of them, then it went to the next of Kin; and ſo it is in our Law, only with this Difference, that the

Lands

Lands ſhall not deſcend equally, but thoſe ſhall go to the eldeſt; and if there are no Children, nor any deſcending from them, it ſhall not go to the Father or Mother, but to the Father's Brother or Grandfather's Brother.

And in this Line 'tis a ſtanding Rule, that they who are of the whole Blood are firſt to be admitted.

As for Inſtance, *Andrew* had Iſſue *Benjamin* and *Chriſtian* by one Venter, and *Daniel* by a ſecond Venter, and dy'd. *Benjamin* ſucceeded his Father, and dy'd without Iſſue; in this Caſe *Chriſtian*, the Siſter of *Benjamin* by the whole Blood, and not *Daniel* the Brother by the half Blood, ſhall ſucceed.

So where *Edward* had a Brother *Francis* of the whole Blood, and a Son *George* by one Venter, and *Henry* by another, *George* ſucceeded his Father, and dy'd without Iſſue; in ſuch Caſe, *Francis* the Uncle ſhall ſucceed *George*, becauſe he is of the *whole Blood*, and *Henry* is only by the half Blood.

But if *Francis* the Uncle die without Iſſue, then *Henry* ſhall ſucceed, becauſe he is of Kin both Ways, as well to his Father as to his Uncle.

This Rule extends no farther than Brothers Children; for beyond them the *nearneſs of Degree*, and not whether they are of the whole or half Blood, is to be conſider'd: As for Inſtance, there were two Brothers of the whole Blood, and one of the half Blood; then the two Brothers of the whole Blood dy'd, leaving each of them a Son, then one of the Sons dy'd; in this Caſe, the ſurviving Uncle of the half Blood, ſhall be admitted before the other Son of the Brother of the whole Blood.

So

So if a *Nephew* hath two Uncles who are Brothers, one of them hath Iſſue *William*, who hath Iſſue *Robert*, then *William* dies, and afterwards the Nephew dy'd; in this Caſe the ſurviving Uncle ſhall be admitted before *Robert* the Grandſon of the dead Uncle, tho' that Uncle was of the whole Blood to the Father of the Nephew deceas'd.

A Brother's Son of the *whole Blood*, ſhall exexclude a Brother of the *half Blood*; but the Children of Brothers and Siſters of the half Blood, ſhall exclude all other collateral Aſcendants, as Uncles, Aunts, *&c.* and all remoter Kindred of the whole Blood in the collateral Line.

But then the Brothers of the half Blood, and their Children, ſucceed equally *per Stirpes*, and not *per Capita*, according to the diſtinct Number of their ſeveral Perſons.

A Man had Iſſue *Thomas* by one Wife, and *William* by another, and dy'd, his Widow marry'd again, and had Iſſue *Francis* by her ſecond Huſband; then *William* dy'd without Iſſue, leaving *Thomas* his half Brother by the Father's Side, and *Francis* his half Brother by the Mother's Side, both thoſe Brothers ſhall equally ſucceed to *William*, being equal in Degree, and equal in Blood to him; but 'tis otherwiſe in the Civil Law.

And in this Line there is likewiſe a Difference between a *Purchaſe* and *Deſcent*; for if a Man purchaſeth Lands and dieth, it ſhall never deſcend to the half Blood; but in Caſe of a Deſcent from a common Anceſtor, 'tis otherwiſe; as where *Anthony* had Iſſue *Benedict* and *Charity* by one Venter, and *David* by another Venter; if *Benedict* purchaſeth Lands, and dieth without Iſſue, it ſhall deſcend to *Charity*, and not to *David*: So if Lands deſcend from *Anthony* to *Benedict*, and

and he had enter'd, and then dy'd without Iſſue, it ſhall likewiſe go to *Charity*; but if *Benedict* had ſurviv'd his Father, and afterwards dy'd before Entry, in ſuch Caſe *David* ſhould inherit, and not his Siſter *Charity*, becauſe he is Heir to his Father, who was laſt actually ſeis'd.

Lands deviſed for Payment of Debts 155.

Lands deviſed, lying in two Vills or Counties.

See *Dyer* 246, *Carew* verſus *Marſh.*

The Caſes relating to this Matter, are as follow:

Wooden *verſus* Oſborn, Cro. Eliz. 674. 3 Leon. 77. 2 Cro. 21. *reported there by the Name of* Tuteſham *verſus* Roberts.

LANDS call'd *Hayſland* extended to two Vills, *viz.* to *Cleyton* and *Cockfeild* in *Suſſex*, and the Teſtator deviſed all his Lands in *Cockfeild* to his youngeſt Son and his Heirs, and if he dy'd without Iſſue, then his three Daughters ſhould have *Hayſland*; he dy'd without Iſſue; adjudg'd, that the three Daughters ſhall not have *all Hayſland*, but only ſo much thereof as was in *Cockfeild*, becauſe no more was deviſed to the *youngeſt Son.*

†Deny *Sir* Anthony, 2 Leon. 190

† The Mannor of *Cheſham* was Part of *Cheſham*, and Part in *Hertford*, and the Teſtator having other Land in *Hertford*, deviſed his Mannor of *Cheſham* to his eldeſt Son in Tail, and his Lands in *Hertford* to his youngeſt Son; adjudg'd, That he ſhall have that Part of the Mannor of *Cheſham* which lies in *Hertford.*

Dyer 261.

The Teſtator had Lands in a *Vill*, and in *two Hamlets* in the ſame *Vill*, and deviſed all his Lands in the *Vill*, and in *one of the Hamlets*, naming it, and dy'd; adjudg'd, That the Lands in the other *Hamlet*, though they were in the *Vill*, did

did not pass, because they were not express'd; but one of the Judges was of a contrary Opinion, because the principal Word *Vill* comprehended both the Hamlets; this is true, and probably the Lands in both might have pass'd, if the Testator had not expresly nam'd one.

A Man had a *Moiety* of certain Lands in *Kent*, and another *Moiety* of Lands in *Essex*, and devised *all his Moieties*, and other his Lands in *Kent*, *&c.* adjudg'd, That by this Devise both his Moieties pass'd. Mirrel *versus* Nichols, 1 Bulst. 117

Lands pass by the Word *Rents*, and by the Word *Livelihood*, and by the Word *Mortgages*. *Leases.* See *Term for Years.* Moor 640, 771. 2 Cro. 104. Owen 30. Cripps *versus* Grisell, Cro. Car. 37.

Legacy.

A *Legacy* is a particular Thing given by the Testator, in and by his last Will to be paid or perform'd by his Executor, and the Person to whom 'tis given, is call'd a *Legatee.*

Under this Title I shall mention,

(A.) *What shall be a good Legacy, and who shall be a good Legatee to take by the Will.*
(B.) *In what Court 'tis to be recover'd.*
(C.) *Securities relating to Legacies.*
(D.) *Where a Legacy shall survive, and where not.*
(E.) *Other Cases concerning Legacies, and Interest thereof, and refunding.*

(A.) What shall be a ‖ *good Legacy*; and as to that Matter I find, that the Testator made his Will, and afterwards said to his *Executor*, *I will that* R. B. *shall have* 20 l. *more.* It was a Question, Whether this was a Legacy recoverable or not, Because it was no more then *Fidei Commissum*, and not ‖ Cartwright's *Case*, *alias* Pearson *versus* Cartwright, Godb. 246. 2 Cro. 345. 2 Bulst. 207 Benson *versus* Cartwright.

not annex'd to the Will by any *Codicil*: The Case is reported by Justice *Croke*, who tells us, That the Testator gave Legacies, and afterwards said to his *Executor*, I have by my Will given particular Legacies, *I would you to encrease it to such a Sum*; and he tells, this by the Civil Law is call'd *Commissum Fidei*, and a good Legacy, and recoverable in the Spiritual Court, which Court may compel a Codicil made by Word, to be added to a written Will.

Peirce *versus* Dacres, 2 Leon. 119. Gould. 58.

The Testator covenanted with *W. R.* to pay to three Persons each of them 10*l.* a-piece at the Age of 24 Years, and gave Bond to a Friend for Performance of Covenants; afterwards he devised 10*l.* a-piece to those three Persons in Performance of his Covenant and Bond. It was objected, that this was not given as a Legacy, but in Performance of his Covenant, *&c.* But adjudg'd, That it shall be taken as a Legacy, because the three Persons were Strangers to the Covenant.

Snell *versus* Dee, 2 Salk. 415.

The Father devised in these Words, *viz.* I give 200*l.* a-piece to the two Children of *W. R* at the *End of ten Years* after my Decease; and afterwards those two Children *died within the ten Years*; adjudg'd a lapsed Legacy; for the Difference is *where a Devise is to take Effect at a Time to come*, and where *Payment of a Sum is to be made at a Time to come*; so wherever the Time is annex'd to the Legacy itself, and not to the Payment of it, if the Legatee dies before that Time happens, 'tis a lapsed Legacy.

Dens *versus* Dens, 2 Bulst. 153

Then as to a Legatee in some Cases, 'tis necessary that he should be *born* at the Time of the making of the Will, as a Devise of 100*l.* to *the Children of R. B.* who had then five living, and before he dy'd he had two more born; adjudg'd. That they shall have no Share of the 100*l.* because there being *Children* living at the Time

of

of the making the Will, it shall not be presum'd that he intended it for the Benefit of any more, who were not then living.

(B.) *Where the Thing given is Testamentary, 'tis properly to be recover'd in the Spiritual Court, but some Questions have been made what is Testamentary and what not.* See Sale of Lands by Executors.

As where the † Testator devised *Leases* to his eldest Son, except 140*l.* to be rais'd out of such *Leases* for Portions for his Daughters, and they libell'd in the Spiritual Court for the Money; and upon a Prohibition the Question was, Whether this was a *Legacy Testamentary*, or whether it should be accounted as a Rent issuing out of the Lands? And adjudg'd, That it was a *Legacy Testamentary*, and to be recover'd in the Spiritual Court. † 1 Bulst. 153.

So where the Testator devised a Legacy to be rais'd out of the *Profits of his Lands*, this was held a meer personal Legacy, and to be recover'd likewise in that Court. Love *versus* Naplesden, 2 Cro. 279. 1 Bulst. 152

'Tis true, the Common Law takes Notice of a *Legacy*, but that is in Collateral Matters, as where a Promise is made to *pay Money*, if the Plaintiff would forbear to sue for a *Legacy*; this is a good Consideration to ground an Action on the Case, but such Action will not lie for a Legacy *in Specie*; if it should, then Actions would be brought for every Thing which might be recover'd in the Spiritual Court. Denn's Case, S. P. Nicholson *versus* Sherman, Raim. 23. 1 Sid. 45.

But Justice *Twisden* was of Opinion, That an Action on the Case would lie for a *Legacy* devised to be paid out of the *Profits of the Land*; but if the Devise had been of a *Rent* to be paid out of a *Lease for Years*, there the Suit must be in the Spiritual Court, because the Rent issu'd out of the Lease which is Testamentary; for 'tis Ramsey *versus* Rosse, 1 Sid. 279.

'tis a Chattel, and the Rent muſt be of the ſame Nature.

Piſchall *verſus* Ketteridge Bendlos 21 New Benlow 60.

A Deviſe of a Legacy to be paid *out of the Profits* of his Lands; and he deviſed the Lands for a Term of Years to his Executors, to levy the Sum, and pay it to the Legatee; adjudg'd, This is a Temporal Thing, and not Teſtamentary, becauſe the Legacy is to come out of the Profits of the Lands.

1 Vent. 291 Richardſon *verſus* Deſborow, *and* 2 Salk. 547. Shotter *verſus* Friend, S. P.

So that where a Thing is not Teſtamentary, 'tis not to be recover'd in the Spiritual Court; but if a Suit is brought in that Court for a Thing which is Teſtamentary, and the Defendant proves Payment by one Witneſs, which they refuſe, a Prohibition will be granted.

A Legatee ſued in the Prerogative Court, and a Prohibition was pray'd upon the Statute 23 *H.* 8. for that the Parties liv'd in two Dioceſes; but becauſe the Will was prov'd in the Prerogative Court, and the Suit was there, and Sentence given for the Legacy, and an Appeal to the Delegates, and the Sentence affirm'd, and Coſts, Taxes, and Execution upon that Sentence, 'tis now too late.

Smith *verſus* Pendrell, Cro. Car. 97.

Goodwin *verſus* Goodwin, Yel. 39.

(C.) *If Security is given to pay the Legacy, then an Action at Law is the proper Remedy to recover it,* as where the Teſtator gave 20*l.* to his Daughter, and the Executor gave a *Bond* of 40*l.* with a Condition for the Payment of this Legacy; it was held, ſhe could never afterwards ſue for the Legacy in the Spiritual Court, for it was extinguiſh'd by the Bond, and become a Debt at Common Law.

Gardner's *Caſe*, 2 Roll. Rep. 160.

But this was againſt the Opinion of Juſtice *Doderidge*, who held, That the taking the *Bond* did not totally deſtroy the Nature of the Legacy, but that the Plaintiff might ſue for the ſame in the Spiritual Court.

The

The Teſtator deviſed to his Niece 500*l.* which *the Lady* Chomley *had then in her Hands, and for which ſhe gave Bond*, the Money was paid to the Teſtator before he dy'd; but adjudg'd, That it was due though the Security was alter'd, becauſe this was neither *Legatio Nominis*, nor *Legatio Debiti*, but a pure *Money Legacy*, and the Words only ſhew that he intended the Legacy ſhould be as certain as he could demonſtrate; but if it had been a *Specifick Legacy*, it muſt be loſt by altering the Security. Pawlet's *Caſe*, Raim. 335.

A Legacy was given to an *Infant*, and paid to the *Father*, who became *inſolvent*; afterwards when the Legatee came of Age, he ſued the Executor for this Money; but decreed, That the Payment to the *Father* was good, unleſs the Executor took Security to indemnify himſelf; for if ſo, then he paid it at his Peril. Holloway *verſus* Collins, 1 Ch. Rep. 245.

'Tis true, an Executor may pay a Legacy without taking Security to refund, if there is a Defect of Aſſets to pay Debts and other Legacies; but he is not bound to do it without taking Security for that Purpoſe; for if he ſuggeſts divers Debts due by the Teſtator, the Courts at Common Law will prohibit the Proceedings in the Spiritual Courts for a Legacy, unleſs the Plaintiff will give Security to refund, if the Debts are recover'd on theſe Bonds. Nelthrope *verſus* Briſcoe, 1 Ch. Rep. 136. Necton *verſus* Sharpe, Moor 413. Owen 72. Gould: 141

In ſome † Caſes an Executor may be compell'd to give Security to pay a Legacy, as where 1000*l.* was given to be paid to the Legatee at the Age of twenty one, who exhibited a Bill againſt the Executor, ſuggeſting, that he had waſted the Eſtate, and praying that he might give Security to pay the Legacy when due, and it was decreed accordingly. †Duncomban *verſus* Brint, 1 Ch. Rep. 121.

Buſtard *verſus* Stuckely, 2 Lev. 209.

In the Civil Law there is no *Survivorſhip* amongſt Legatees; for if *Goods* are deviſed to two *jointly*, and then one of them dies, the *whole* ſhall not ſurvive; but the Executor of the dead Legatee ſhall have his Share; but where the Teſtator deviſed Goods to two *jointly*, and his *Executor* aſſents to the Legacy, and then one of them dies, by this Aſſent an Intereſt is veſted, and 'tis become a Chattel, and governable by the Rules of the Common Law.

Tayler *verſus* Shore, T. Jones 261.

And ſo it was adjudg'd formerly, *viz. Mary Shore* having given ſome Legacies, made *Elizabeth Wheeler* her Executrix, and gave her and Sir *John Shore* the *Diſpoſal of the Reſidue of the Goods*, and dy'd. *Elizabeth Wheeler* did not prove the Will, but made *Elizabeth Tayler* her Executrix, and dy'd; afterwards Sir *John Shore* took out Adminiſtration of the Goods of *Mary cum Teſtamento annexo*, and made the Lady *Shore* his Executrix, and dy'd, and Adminiſtration *de Bonis non, cum Teſtamento annexo* of the ſaid *Mary* was granted to the Lady *Shore*; and upon an Appeal to the Delegates between her and *Elizabeth Tayler*, it was adjudg'd, That by the Words, *viz.* to *diſpoſe of the Reſidue, &c.* an Intereſt was veſted, and that it was not a bare *Authority* to diſpoſe; and this being a Legacy, the whole did not ſurvive to Sir *John Shore*, as it would by a Gift of Goods at Common Law, but that *Elizabeth Taylor* and the Lady *Shore* had an equal Right; yet when *Adminiſtration de Bonis non, &c. cum Teſtamento annexo*, is granted to one, 'tis good, and ought not to be repealed.

1 Salk. 153 *in the Houſe of Peers, Mich.* 1689.

Lands where ſettled on Truſtees to raiſe ſo much Money for Payment of Debts and Legacies; all the Money was rais'd, and the Heir pray'd to have the Lands. It was objected, That tho' all the Money was rais'd, yet it was not paid, becauſe the Truſtees had converted great Part of it

it, to their own Uſe; but decreed, That the Heir ſhall have the Land diſcharg'd, becauſe it was Debtor for the Debts and Legacies, but not for the Fault of the Truſtees, againſt whom both the Creditors and Legatees may take their Remedy.

Decreed, That where Lands are made ſubject by Deed or Will to pay Debts, even thoſe which are barr'd by the Statute of Limitations, ſhall be paid, becauſe they are ſtill Debts in Equity, and tho' the Statute hath taken away the Remedy to recover them, yet the Duty ſtill remains. 1 Salk. 154

Where a Truſtee or an Executor compounds Debts or Mortgages, and buys them in for leſs then is really due, he ſhall not have the Benefit, but the Creditors and Legatees; and if there are none, then he who is entitled to the Surplus, ſhall have it; but if one who is *neither Truſtee or Executor*, but acts for himſelf, buy in a Mortgage for leſs than is due, he ſhall be allow'd all that is actually due, becauſe he ſtands in the Place of the Mortgagee, who might have given him all if he would; and in ſuch Caſe, *what is due*, and not what he gave, ſhall be the Meaſure of his Allowance; for ſince he runs the Hazard of a Loſs, if any ſhould happen, he ought to have the Benefit. 1 Salk. 155

The Teſtator had three Nieces, *A.* and *B.* and *C.* he *owed his Niece A.* 100 *l. on Bond*, and he deviſed 300 *l. to her*, and to his other two Nieces 200 *l.* a-piece; afterwards *he borrowed* 100 *l. more of his Niece A.* and dy'd. It was inſiſted, That ſo much of the Legacy of 300 *l. deviſed to his Niece A.* which amounted to 200 *l.* ſhould go in Satisfaction of the Debt of 200 *l.* which was due to her, and owing by the Teſtator; and the rather, becauſe the Legacy given to her, was greater than the Debt he ow'd to her; and a Man ſhall be intended Cuthbert *verſus* Peacock, 1 Salk. 155 *See* Cranmere's *Caſe* poſt.

tended to be juſt in paying his Debts, before he ſhall be charitable in giving Legacies; but there being Proof of Aſſets, and a greater Kindneſs to this Niece then the other, it was decreed, that ſhe ſhould have the 300*l.* over and above the 200*l.* which the Teſtator owed her.

Herne *verſus* Merrick, 2Salk.416.

The Teſtator being ſeis'd in Fee, and owing Money on Bonds, deviſed ſome *Legacies to his Children whom he had already* advanc'd, and his Lands to his eldeſt Son in Tail, whom he made Executor, and dy'd. The Son paid the Bond Creditors out of the perſonal Eſtate: And now the Legatees bring a Bill in Equity, that they might have their Legacies paid out of the Lands; and the Maſter of the Rolls decreed, That the real and perſonal Eſtate ſhould be ſo charg'd, that both the Bond Debts and the Legacies ſhould be paid; but upon an Appeal to the Lord Chancellor *Harcourt*, the Lands were exempted from this Charge: 'Tis true, if they came to the *Son by Deſcent*, the Legatees might have Relief in Equity; but ſince they were *deviſed to the Son* in Tail, it was as much his Intention that his Son ſhould have them, as the Legatees ſhould have their Legacies, and this Court never breaks into a ſpecifick Legacy to make good a pecuniary Legacy; and here the Children being otherwiſe provided for, are not in Nature of *Creditors*.

2Salk.508. Cranmer's *Caſe*. *See* Cuthbert *verſus* Peacock ante.

The Teſtatrix owed *Cranmere* 50*l.* and deviſed to him a Legacy of 500*l.* and made him ſole Executor; but after the making her Will ſhe borrow'd 150*l.* more of *Cranmere*, and afterwards dy'd. The Maſter of the Rolls decreed, this Legacy ſhould be a Satisfaction of both theſe Debts; but upon an Appeal to *Harcourt*, Lord Chancellor, that Decree was reverſed, becauſe a Court of Equity cannot ſay, the Teſtatrix paid a Debt, when ſhe deviſed a Legacy.

The

The Father being ſeiz'd in Fee of a *foreign Plantation*, deviſed it to his Son, and made the *Defendant Executor*, and dy'd. The Executor made a Leaſe of it for Years, rendering Rent, and this was in *Truſt for the Son*, who now exhibited a Bill in Equity to have the Rent. The Defendant confeſs'd the Deviſe and the Leaſe, but ſaid, That great Loſſes had happen'd on the Teſtator's Eſtate, and that he had paid great Sums to ſatisfy the Creditors of the Teſtator, and therefore pray'd that he might *retain* the Rent to reimburſe himſelf. The Lord Chancellor *Finch* decreed, That tho' a Legatee ſhall refund againſt Creditors, if there is not ſufficient Aſſets to pay all of them; and ſo likewiſe againſt Legatees, where all of them have not an equal Share, in regard Aſſets fall ſhort, yet an Executor himſelf ſhall never bring a *Legacy back*, after he hath once aſſented to it: 'Tis true, if he paid the Teſtator's Debts by Compulſion, it might have been otherwiſe; but that doth not appear in the Anſwer: And as to the Plantation, tho' 'tis an Inheritance, yet it being in a foreign Country, 'tis a Chattel, and Teſtamentary; and laſtly, as to *refunding*; if the Spiritual Court give Sentence for a Legacy, without taking Security to refund, a Prohibition will be granted. Noel *verſus* Robinſon, 2 Vent. 358.

The Father being an *Executor*, *waſted* the Goods of his Teſtator, and afterwards *deviſed his own Goods to W. R.* and made his own Son *Executor*, and dy'd; afterwards a Bill was exhibited againſt the *Son*, who was an *Executor of an Executor*, to bring him to an Accompt of the Eſtate of the the firſt Teſtator; and pending that Suit, another Bill was brought againſt him by *W. R.* the Legatee, to whom the Goods were deviſed as aforeſaid, and thereupon he deliver'd the Goods to *W. R.* and aſſented to the Legacy; afterwards in Hodges *verſus* Waddington, 2 Vent. 360.

the Suit upon the Bill which was firſt exhibited, it appear'd, that the firſt *Executor had waſted* the Goods, and thereupon he who was Complainant in that Bill, and alſo the Son, who was Executor of his Father the waſting Executor, exhibited another Bill againſt *W. R.* the Legatee to compel him to refund; but there could be no Relief upon that Bill, becauſe the Son, who was Executor of the waſting Executor, was one of the Complainants, and having aſſented to the Legacy, ſhall not be admitted to bring it back, and undo his own Aſſent; but Liberty was given to bring a new Bill againſt *W. R.* the Legatee, and the Executor of the waſting Executor; and then it was decreed, That the Legatee ſhould refund againſt a Creditor of the Teſtator, who in Equity could only charge the Executor of his Executor upon a waſting by the firſt Executor; but if an Executor pay a Debt upon a Simple Contract, there ſhall be no refunding to a Creditor of an higher Nature, the principal Caſe went upon the Inſolvency of the Executor.

Snell verſus Dee, 2 Salk. 415

Where a Legacy is deviſed, and no certain Time appointed for the Payment, if the Legatee is an *Infant*, he ſhall have Intereſt after one Year from the Death of the Teſtator, for ſo long Time is allow'd the Executor, that he may ſee whether there are any Debts, and no Laches ſhall be imputed to an Infant; but if the Legatee is of full Age at the Death of the Teſtator, he ſhall have no Intereſt but from the Time of the Demand of his Legacy; but where 'tis made payable at a Day certain, it muſt be paid with Intereſt from that Day.

Life,

Life, what ſhall be an Eſtate for Life by Deviſe.

WHERE there are no Words of *Inheritance*, the Deviſee hath only an Eſtate for *Life*, and though ſome Words may ſeemingly tend that Way, yet the Eſtate is ſtill for *Life*. *See* Heir. 342.

(1.) *As a Deviſe to one paying ſo much out of the Profits, &c. or to diſpoſe to her Children, &c.*
(2.) *That one ſhall be Heir to the other.*
(3.) *A Deviſe to one, and to his Iſſue Male.*
(4.) *So a Deviſe to two equally to be divided, &c.*

(1.) 'Tis true, the Word *paying* generally makes a Fee-Simple; but where the Payment is to be out of the *Profits* of the Lands, 'tis otherwiſe.

A Copyholder having ſurrender'd to the Uſe of his Will, deviſed his Lands to his Wife for Life, and that after her Death, ſhe or her Executors might *ſell the Lands ſecundum formam ultimæ Voluntatis*; this Surrender was preſented, and the Wife was admitted for Life, *ſecundum formam ultimæ Voluntatis*; adjudg'd, That ſhe had an expreſs *Eſtate for Life*, and a Fee-Simple in her *to ſell*; and for that Purpoſe thoſe Words *After her Death* ſhall be conſtru'd, that ſhe might ſell the Eſtate which was to remain after her Death; and that if ſhe had not Power to ſell it *in Fee*, then the Words to ſell *ſecundum formam Voluntatis* had been void; ſo that ſuch Conſtruction muſt be made, that all the Words of the Will may ſtand, if poſſible. Mich. 29. Eliz. 1 Leon.

In a ſpecial Verdict in Ejectment the Caſe was, the Teſtator being ſeis'd in Fee, deviſed his Lands to his *Wife for Life*, and *then to be at her Diſpoſal to any* Thomlinſon *verſus* Dighton, 1 Salk. 239

of her Children who ſhall be then living; adjudg'd, That the Wife had only an Eſtate for Life, and that the Power of diſpoſing was a ſeparate and diſtinct Gift; for the Eſtate given to her is very expreſs and certain for her Life, and the Power to diſpoſe is additional, and not like thoſe Caſes which are general and indefinite, *viz. A Deviſe to* W. R. *that he ſhall ſell, or to ſell, &c.* there *W. R.* hath Power to convey a Fee, therefore he is conſtrued to have a Fee; but here the Power is ſeparate and diſtinct from the Eſtate for Life.

Dyer 253. Caſſandra's *Caſe.* A grant of a Rent to *W. R.* for the Life of the Wife of the Grantor, and if 'tis in Arrear, that then the ſaid *W. R.* may diſtrein. The Grantor deviſed this Rent, and dy'd; adjudg'd, That the Deviſee ſhall have it, becauſe the Clauſe of Diſtreſs gave a Freehold to the Grantee, determinable upon the Death of the Wife of the Grantor.

Dyer 357. Chick's *Caſe*, Cro. Car. 112. S. C. *by the Name of* Anſley *verſus* Chapman, The Teſtator being ſeis'd in Fee of an Houſe in *London*, deviſed it to his Couſin *Alice, and after her Deceaſe* to *W. R.* her Son and Heir apparent; *Alice* being then a Widow, marry'd again, and had Iſſue, and dy'd; adjudg'd, That the Huſband ſhould not be Tenant by the Curteſy, becauſe his Wife was only Tenant for Life.

Muſchamp *verſus* Bluer, Bridgm. 132. Jones 211. A Deviſe of his *Freehold Lands* to his Sons *Henry* and *Michael*, upon Condition, that if they *ſell* to any but to his Son *Matthew*, then he to enter, and that all his Sons ſhall *pay* to their Mother 40 *l. per Annum* during her Life, for *Dower out of all his Lands*, Part and Part alike; adjudg'd, That *Henry* and *Michael* had but an Eſtate for *Life*, and the Condition annex'd to it, doth not enlarge the Eſtate, becauſe 'tis a Condition more proper to be annexed to an Eſtate for *Life*, than to an Eſtate *in Fee*; for if it ſhould be conſtru'd to be a *Fee-Simple*, then he could not be reſtrain'd from *ſelling*. And as to the Payment of the 40 *l.* for her Dower,

'tis

'tis not a Payment of a Sum in Groſs, and ſo a *Charge upon the Perſon* of the Deviſee; but *upon the Land*, in nature of a yearly Rent out of the *Profits*; for where the Charge is upon the Land, or where the Payment is to be made out of the *Profits of the Land*, there the Deviſee can be no Loſer, as he may where the Payment is to be of a Sum in Groſs; for in ſuch Caſes, the Deviſee may die before he can receive it out of the *Profits*.

So where there were Tenants for Life, Remainder in Fee to his Son, who deviſed to his *Wife* all the Lands that he might have in Reverſion after the Death of his Father, *paying* to the right Heirs of the Father 40 *l.* yearly; the Son dy'd, living his Father; adjudg'd, That the Wife had but an Eſtate for *Life*, and ſhe ſhall not pay the Annuity till after the Death of the Father, becauſe the right Heir can have no Right during his Father's Life. Dyer 371. *b*

Deviſe of his Lands to his Wife for Life, and after to be diſpos'd by her to ſuch of my Children as ſhe ſhould think fit, this makes a *Fee*; but if it had been, I deviſe my Lands, *at my Wife's Diſpoſe*, to ſuch of my Children as ſhe ſhall think fit, there the Children take it expreſly by the Gift of the Father, and the Words *at her Diſpoſe*, relate to the Children, not to the Eſtate. Carter 235

(2.) *Where a Deviſe is to two, and that one ſhall be Heir to the other, that makes an Eſtate for Life, viz.* the Teſtator being ſeis'd in Fee, deviſed that his Wife ſhould take the Profits 'till his Daughter *Mary* was of the *Age* of ſixteen, and if ſhe dy'd, then *R. B.* ſhould be his *Heir*; the better Opinion was, that ſhe had an Eſtate for Life. Conie's *Caſe*, 4 Leon. 37, 213.

The Teſtator had three Sons, and Lands in three Villages, and devis'd his Lands in *B.* to *John*, his Lands in *C.* to his ſecond Son, and his Lands Wood *verſus* Ingerſole, 1 Bulſt. 61. 2 Cro. 260.

Lands in *D.* to his youngeſt Son, but did not limit what Eſtate they ſhould have; then his Will was, That *if any of them died, the other ſurviving ſhall be his Heir. John* the eldeſt Son had *Iſſue*, and dy'd; it was adjudg'd, that ſuch *Iſſue* ſhall have *John*'s Part excluſive to his Uncles, becauſe *John* having only a Freehold for Life, the Reverſion in Fee deſcended on him, by which Deſcent his Eſtate for Life muſt be drown'd, and his Death cannot revive, and veſt the Remainder in his two Brothers.

Pettiwood *verſus* Cook, 1 And. 180 3 Leon. 180 Latch. 40. Cro. Eliz. 52. 2 Leon. 129, 193. antea 356. S. C.

And long before this Caſe happen'd, the Teſtator had three Sons, and three Houſes, and deviſed to each of his Sons one Houſe in Tail, and if any of them dy'd *without Iſſue*, that the Survivors ſhould have *totam illam partem*, equally to be divided between them; one of them dy'd without Iſſue, the Survivors ſhall have only an Eſtate *for Life* in that Part, becauſe there are no Words by which it appears what Eſtate they ſhall have in it; for the Words *totam illam partem*, do extend only to the whole Meſſuage, and not to the whole *Eſtate* the Teſtator had in it, and the *Fee* ſhall deſcend to the *Heir*.

Pitt *verſus* Brown, 2 Brownl. 74

So a Deviſe of an Houſe to his eldeſt Son in Tail, and another Houſe to his ſecond Son in Tail, and another to his third Son in Tail; and if any of them die without Iſſue, Remainder to the other two equally; this ſhall be only an Eſtate for *Life*, becauſe thoſe Words extend to the Quantity of the Land, and not to the Quantity of the Eſtate.

Dickens *verſus* Marſhall, Cro. Eliz. 330. Moor 594. Goldſ. 182

So a Deviſe of all his *Lands and Goods* after his Debts paid, to *R.* and *B.* his Children, *equally to be divided between them*; adjudg'd, that this was only an Eſtate for *Life* in the *Lands*, for the *Goods* and *Lands* are joined together, and 'tis a Deviſe of the Goods for ever, of which they were Tenants in Common;

Common; yet there being no Words of *Inheritance* to paſs the *Lands*, 'tis only an Eſtate for Life in them; for the Words *equally to be divided* ſhall not relate to the Continuance of the Eſtate for ever, but to the ſeveral Occupations of his Children. 1 Roll. Abr. 834.

Deviſe to *D.* and to his *eldeſt* Iſſue *Male*; (he having no Son then living) adjudg'd, That *D.* had only an Eſtate for *Life*, becauſe of the Word *eldeſt*. But Serjeant *Moor*, who reports this Caſe, tells us, it was *Gavelkind Lands*, and that the Deviſe was to one and to his *eldeſt Iſſue Male*, and ſo from Heir Male to Heir Male for ever; and that this was an Eſtate for Life, only in all the Heirs Males which were *then born*, and not to others who ſhould be born afterwards, for ſuch a Limitation of Lands in *Perpetuity* is void. Loveleis *verſus* Loveleis, Cro. Eliz. 40. 1 And. 230. 2 Leon. 36. Moor 372.

So a Deviſe to *Robert Archer* for Life, and afterwards to the *next Heir Male* of *Robert*, and to the Heirs Males of the Body of ſuch next Heir Male. *Robert* had Iſſue *John*, this is only an Eſtate for *Life* in *Robert*, and *John* the right Heir ſhall take by *Purchaſe* and not by *Deſcent*. Baldwin *verſus* Smith, Cro. Eliz. 453. 1 Rep. 66. b. 2 And. 37.

The * Teſtator deviſed his Mannor of *Dale* to his ſecond Son; *Item*, I give my Mannor of *Sale* to my ſaid Son and *his Heirs*, the Son hath only an Eſtate for Life in the Mannor of *Dale*, for the Word *Item* ſhall not be taken as a *Copulative*, but as a *new Grant*. *Moor 52.

A Man had Iſſue two Sons, and deviſed a Moiety of his Houſe to his Wife *for Life*, and the other Moiety to his ſecond Son, *Item*: I deviſe to my ſaid Son the Houſe and *all the Lands* belonging to it, after the Death of my Wife; adjudg'd, That he had but an Eſtate *for Life*. Fawcett's *Caſe*, 1 Roll. Abr. 834, 844.

Deviſe of *Black-Acre* to his Daughter, and the *Heirs of her Body*; *Item*, I deviſe *White-Acre* unto my ſaid Daughter; adjudg'd, That ſhe ſhall have 1 Roll. Abr. 844.

only

only an Eſtate for Life in *White-Acre*, for the Word *Item* doth not import that ſhe ſhall have *White-Acre* in the ſame Manner that ſhe had *Black-Acre*; but if it had been, *And alſo White-Acre*, ſhe had an Eſtate Tail in both, becauſe 'tis an entire Sentence.

Lilly verſus Tayler, Owen 148. Clerk verſus Day, Moor 393. Cro. Eliz. 818. 2 Roll. Abr. 830.

Deviſe to *Roſe* for Life, and if ſhe marry after my Deceaſe, and have any *Heirs of her Body* lawfully begotten, then that *Heir* ſhall have the Land after her Deceaſe, and the *Heir of the Body of ſuch Heir*; and if ſhe dy'd *without Iſſue*, Remainder over; adjudg'd, That *Roſe* had only an Eſtate *for Life*, becauſe the *Words of Limitation* being grafted on the Word *Heir*, do plainly ſhew, that the Word *Heir* was uſed as a *Deſignation of the Perſon*, and not for a Limitation of the Eſtate. This Caſe is reported by Juſtice *Croke* by the Name of *Clerk* and *Day*, and we are told by Serjeant *Moor*, That *Roſe* had but an Eſtate *for Life*, and that the Inheritance was in abeiance during her Life, and that immediately upon her Death it veſted in the Heir by Purchaſe. Juſtice *Crook* tells us it was adjourn'd, but that two Juſtices againſt the Opinion of *Popham*, held, That *Roſe* had an Eſtate for Life, for the Reaſon before-mention'd; and they all agreed, That a Deviſe to one and to the *Heirs of his Body* made an Eſtate Tail; and the Chief Juſtice held, That if an Eſtate for *Life* is limited to the *Anceſtor*, and by the ſame Deed 'tis limited to his *Heir*, he ſhall be in by *Deſcent*.

Bacon, verſus Hill, Cro. Eliz. 497. Moor 464.

Deviſe of the whole to his Wife *for Life*, and afterwards to his three Sons three Parcels of Land, but doth not limit what Eſtate either ſhall have; and that if any of his Sons marry, and have *Iſſue Male of his Body, and die before he enter on the Land*, then his *Iſſue* ſhould have that Part; the youngeſt Son marry'd, had Iſſue, and *entered into his*

his Part, and dy'd; adjudg'd, That he had only an Eſtate *for Life*, and therefore his Iſſue could not have his Part, but the Fee muſt deſcend to his Uncle, who was the eldeſt Son of the Teſtator; for though 'tis true where a Deviſe is to one, and if he *die without Iſſue*, that it ſhall remain over, this makes an Eſtate Tail; yet 'tis not ſo if the *dying without Iſſue* is limited to be within a *certain Time*, as if he die without Iſſue before he is 24 Years of Age, or living ſuch a one, or before *he enter* on the Land, as in this Caſe:

The Teſtator was ſeis'd of Lands in Fee, and had *Lands mortgaged to him in Fee*, and the Mortgage was forfeited, (but *Rolls* ſays it was not) and having deviſed his own Lands in Fee, he gave to his Wife all the reſt of his Goods, Chattels, Leaſes, *Eſtates and Mortgages*, whereof he was *poſſeſſed*; adjudg'd, That by the Words *Eſtates and Mortgages* there was neither a Fee, nor an Eſtate for *Life* paſſed, becauſe it is coupled with perſonal Things of which he was *poſſeſſed*, but at the moſt ſhe could have but an Eſtate *for Life*. Withinton verſus Merriland, W. Jones 380. Cro. Car. 447. 1 Roll. Abr. 934.

Deviſe of ſome Lands to his eldeſt Son in Tail, and of other Lands to his ſecond in Tail, and of other Lands to *Henry* in Fee. *Item*, I give unto the ſaid *Henry* my Paſture Lands call'd *Southfields*, my Meadow call'd *Warbay*, *&c.* alſo I will, that all Bargains, Grants, and Covenants which I have from *Nicholas Webb*, my Son *Henry* ſhall enjoy and his *Heirs for ever*, and for lack of Heirs of his Body Remainder over. The *Southfield* and *Warbay* were not Bargains of *Webb*; adjudg'd, That *Henry* had but an Eſtate *for Life*; for the Words *Heirs of his Body* extend only to the Bargains of *Webb*, and that where the Heir is diſinherited, there muſt be an apparent Intention collected out of the Words of the Will ſo to do, and Spirt verſus Bence, Cro. Car. 368.

and it ſhall never be done by doubtful Expreſſions as in this Caſe; for having limited ſeveral Lands to ſeveral Sons in Tail, and ſome to *Henry* in Fee, and then giving more to *Henry*, not mentioning what Eſtate he ſhall have, the Law ſhall conſtrue it that he intended it only *for Life*; and the Word *Item* ſhall not couple the Sentences, and extend to the Quantity of *Eſtate*, but to the following Clauſe.

Baker verſus Raimond, 1 And. 91.

Deviſe of the *Fee-Simple* of his Houſe to *R. B.* and after her Deceaſe to *W. B.* her Son; the Mother had only an Eſtate *for Life*, and the Son a Fee in Remainder.

Moor verſus Barber, 4 Mod. 426

ff. The Father made a Settlement on his eldeſt Son for Life, Remainder to the firſt Son of his Body in Tail Male; and afterward by Will he deviſ'd, That if his Son's Wife dy'd without Iſſue Male, *living her Huſband*, that he ſhould have Power to make a Jointure to any other Wife, and for *want of Iſſue Male* of his Son, the Land to remain to his Son by any other Wife; and in Caſe of Failure of Iſſue Male by his Son, then all his Lands to his Grandchildren and their Heirs; adjudg'd, That there being no expreſs Eſtate deviſed to the Son, the Words which ſeem to create an Eſtate Tail, *viz.* in Caſe of Failure *of Iſſue Male* will not do it, and ſo 'tis but an Eſtate *for Life*.

Sir Rich. Pexall's Caſe, 1 Rep. 85. 1 Roll. Abr. 845.

Deviſe of 10 *l. Rent* iſſuing out of all his Lands payable Quarterly, with Power to diſtrein, and to hold Courts of all his Mannors *for Life*; this is a Deviſe of the *Rent* for *Life*, becauſe 'tis a Recompence for his Service in keeping Courts, which was for Life.

Limitation of Estate by Devise.

See 248.

THIS Word is usually taken to be the Bounds or Compass of an Estate, signifying the Time how long it shall continue, or rather a Qualification of a precedent Estate, and it differs from a *Condition*, for that either *creates*, *enlarges*, or *defeats* an Estate upon an incertain Event. *See tit.* Tail

The most apt and proper Words to make a *Limitation* are, *quamdiu*, *Dum*, *Dummodo*, *si*, *quousque*, and the like; but it may be made by other Words, as may be seen in the Cases following:

And in Wills there must be a Devise over to make a *Limitation*, except it is devised to the *Heir* at Law *paying a Sum in Gross*; for that must necessarily be a *Limitation*, because if it should be a *Condition*, it must descend to the Heir, who is the Devisee, and would be extinct in his Person, and then there can be no Remedy to compel the Payment.

As a Devise to his Wife for Life, Remainder to *W.* his eldest Son, *paying* 40 *s.* to each of his Brothers and Sisters; this is a *Limitation*, and not a *Condition*; so that upon Non-payment of the Money, his Estate shall cease, and be transferr'd to the Heir at Law, tho' 'tis true the Word *paying* in a Will generally makes a *Condition*. Wellock *versus* Hammond Cro. Eliz. 204. 3 Rep. 20, 21 2 Leon. 114 *See* Dyer 317.

The Testator had Issue two Sons and two Daughters, and devised his Lands to *H.* his youngest Son in Tail, *upon Condition* that he *paid* his two Daughters 20 *l. per Annum* at their full Age; and if he died, then he devis'd it to his eldest Son and his Heirs, upon the like Condition; and if he did not pay it, then he devis'd the Lands to his Daughters Baldwin *versus* Wiseman, Cro. Eliz. 376. 1 Roll. Abr. 411.

Daughters and their Heirs. Juſtice *Croke* hath reported this Caſe imperfectly, for he tells us, this was adjudg'd to be a *Condition*, and not a *Limitation*, and that the eldeſt Son had the Eſtate for the Breach of the Condition. But my Lord *Rolls* tells us, That if it ſhould be a *Condition*, it would not only defeat the Daughters of their Portions, but the future Deviſe to them, which is directly contrary to the Will of the Teſtator, and therefore it ſhall be conſtrued to be a *Limitation* upon the Eſtate of *H.* the youngeſt Son, and that his Brother, the eldeſt Son, ſhall take it as ſuch.

Hainſworth *verſus* Pretty, 1 Roll. Abr. 411.

So a Deviſe of Lands to his eldeſt Son upon *Condition* that he *pay* 20 *l.* to his Brothers, and if he fail of paying it to either of them, that then he or they may enter and hold the Lands, this is a *Limitation* of the Eſtate.

Fry *verſus* Porter, 1 Vent. 199. Raim. 236. 2 Lev. 61.

'Tis probable upon theſe Authorities the Caſe of *Fry* and *Porter* was adjudg'd, which was a Deviſe of Lands to his Wife *for Life*, and afterwards to his Grandaughter the Lady *Anne Knolls*, and the Heirs of her Body, *provided and upon Condition* ſhe marry with the Conſent of his ſaid Wife, and the Earls of *Warwick* and *Manchester*, or the major Part of them; and in Caſe ſhe marry'd without ſuch Conſent, or die without Iſſue, Remainder over to a Stranger. It was adjudg'd, That though the Word *Condition* is in this Clauſe of the Will, yet 'tis not a *Condition*, but a *Conditional Limitation* of the Eſtate to ſupport the Intent of the Teſtator, and to let in the Remainders; for the bare limiting a Remainder over, makes it a *Limitation* and not a *Condition*; for 'tis in Effect as if the Teſtator had ſaid, if ſhe marry without Conſent, or if ſhe die without Iſſue, my Eſtate ſhall remain to another. And if it ſhould be a *Condition*, and the Grandaughter ſhould not perform it,

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in ſuch Caſe the Heir at Law might enter and take Advantage of it, and by Conſequence he would defeat him in Remainder, which could never be the Intent of the Teſtator; but it being a Limitation, it ſhall only determine her own Eſtate.

A Deviſe of his Lands to his eldeſt Son in Tail, Remainder to his youngeſt Son in Tail, Remainder to the Heirs of the Body of the Teſtator, who had Iſſue a Daughter, Remainder over in Fee, And *if* either of thoſe *on whom he had entailed his Lands, ſhould moleſt the other for the ſame, or mortgage, ſell, or otherwiſe incumber it, that from thence forth ſuch Perſon ſhould be excluded, and the entail made to him ſhould be of no Force, but that it ſhall deſcend, and come to the next in Tail, as if ſuch diſorderly Perſon had not been mention'd in the Will.* The eldeſt Son levy'd a Fine, and he and the youngeſt Son join'd in a Recovery, then the *Siſter* enter'd for a *Forfeiture*; and adjudg'd, that her Entry was lawful, for this was not a *Condition*, but a *Limitation* of the Eſtate; for if it had been a *Condition*, then the eldeſt Son might have enter'd for the Breach thereof, and ſo defeat all the Remainders, which was never intended by the Teſtator; but 'tis a Limitation of their Eſtate which determines the ſame, and caſts the Freehold upon the next in Remainder without Entry.

Newis *verſus* Larke, Plo. Com. 403. Moor 543. *reported there by the Name of* Sharrington *verſus* Minors.

London Cuſtoms.

Under this Title I ſhall mention,

(1.) *The Cuſtoms relating to Diſtribution of Freemen's perſonal Eſtates.*

(2.) *The Cuſtom of Hotch Potch.*

(3.) *Such Cuſtoms as relate to Executors.*

(4.) *To Orphans.*

(1.) AS to the Diſtribution or Diſpoſition of Freemen's perſonal Eſtates.

2Salk.426 If a Freeman of *London* be marry'd, but has no Children; on his Deceaſe, (after Debts paid, and the cuſtomary Allowances for his Funeral, and the Widow's Chamber deducted) the Half of his perſonal Eſtate, by the Cuſtom, belongs to his Widow, the other Half he may diſpoſe of as he pleaſeth.

So if he has Children, and no Wife, half of his Eſtate belongs to his Children, the other half he may diſpoſe of.

But if he has a Wife and Children, one third Part belongs to the Wife, another third Part to the Child or Children, and he can diſpoſe of the remaining third Part only.

And if ſuch Freeman die Inteſtate, the Cuſtom can only affect two thirds, and the remaining third is ſubject to the Statute of Diſtributions, by which one third thereof is allow'd to the Widow, and two thirds to the Child or Children; ſo dividing the whole into ninths, four Ninths belong to the Widow, and five Ninths to the Children.

22 Car. 2. cap. 10. ante 22. 2Salk.426.

If a Freeman make his Will contrary to theſe Cuſtoms, and give away more than the third Part of his perſonal Eſtate from his Wife and Children, they may be reliev'd againſt ſuch Will, by exhibiting their Bill againſt the Executor in the Court of Orphans, and ſo much of the Will as is contrary to the Cuſtom, will be declar'd void.

City *verſus* City, 2Lev.130. Not *verſus Executor of* Sewſter, 1 Cha. Rep. 84. 10 Car. 1.

Or if a Freeman ſhall ſettle or make over all or any Part of his perſonal Eſtate, with a Deſign to defraud either his Wife or Children of their full Shares or Parts, they may likewiſe be reliev'd.

A Freeman of *London* had two Sons, the eldeſt dy'd leaving a Son, and then the Freeman dy'd; the Grandchild, tho' in Law a Repreſentative of the Son who never was advanc'd, has no Part by the Cuſtom of *London*; for the Cuſtom extends only to the Children, and not to the Grandchildren,

dren, *per Northey*, and ſo it was certify'd by the Recorder into *Chancery*. 2 Salk. 426

The Widow of a Freeman is within the Cuſtom for ſhe having the Liberty and Privilege to trade in the City, and ſo able to take Benefit by it ſhall be bound by the Cuſtoms of it.

The Mortgage of an Inheritance to a Freeman hath been held to be Part of his perſonal Eſtate, and to be divided according to the Cuſtom. Thornborough *verſus* Baker, 1 Chan. Caſes 285.

So hath a Legacy, where a Freeman was Executor, and Reſiduary Legatee, and dy'd. The Queſtion was, Whether the perſonal Eſtate being but a Legacy, which till Election veſted *prima facie* in him, not as Legatee, but as Executor? It was agreed, That the firſt Teſtator's Eſtate, which remains in the Executor as Executor, ſhall not be ſubject to the Cuſtom as the Executor's own Eſtate; the Lord Chancellor decreed the contrary, and ſaid, *I will make Election for him.* Civil *verſus* Rich, 1 Cha. Caſes 310.

But where a Freeman of *London* purchaſeth a Leaſe for Years of ſome Houſes in *London* for 700 *l.* and afterwards for 100 *l.* more, bought the Inheritance, and takes the Conveyance in another's Name in Truſt for him and his Heirs, and dies: The Queſtion was, Whether this Leaſe be within the Cuſtom of *London* to be deviſed as a Chattel? For it was agreed by all, that a Leaſe for Years aſſign'd over to attend the Inheritance, is not within it; and the Chancellor's Opinion was, *That neither can this Leaſe, for it is knit to the Inheritance.* 2 Chan. Caſes 260. † Anand *verſus* Honywood, 2 Chan. Rep. 186. 32 Car. 2.

So it has been adjudg'd in † Chancery, where Money was depoſited by the Father to purchaſe Lands in Purſuance of Marriage Articles, that it ſhall be taken as real and not perſonal Eſtate. ‖ 1 Chan. Caſes 199. ante 152. *See* Hammond *verſus* Jones 19 Car. 2.

‖ It was held in the Caſe of *Patte* and *Hatton*, 23 *Car.* 2. that a Citizen of *London* cannot deviſe *contra*. 1 Lev. 227.

his Child's cuſtomary Part over to another, in Caſe the Child die in his Minority.

(2) *As to the Cuſtom of Hotch potch.*

If a Freeman advance any of his Children with a Portion, it ſhall be taken to be in full of their Advancement, and ſhall bar them to demand any farther Part by the Cuſtom; but if it appear what that Portion was by any Writing under the Father's Hand, or by his Will or Marriage Settlement; and although by the ſaid Will or Settlement it is declar'd, that the ſaid Portion is or was in full of his Child's Part by the Cuſtom, yet this Child ſhall come in for a further Share of the cuſtomary Part of his Father's perſonal Eſtate, bringing the Portion already receiv'd into *Hotch-potch* with the unadvanc'd Children.

2 Cha. Rep. 183.

2 Salk. 426.

As for Inſtance, a Freeman has two Children, and giveth to one of them 1000 *l.* towards his Advancement, and then dies worth 9000 *l.* in this Caſe the Wife, the Children, and the Executor, ſhall have three equal Parts, *viz.* 3000 *l.* each, and then the 1000 *l.* given in Advancement, ſhall be brought into *Hotch potch* with the Orphonage Thirds, and equally divided between the two Children, which will make their Shares 2000 *l.* each.

Pr. Lond. 214.

If a Freeman advance his Son or Daughter with a Portion, and they being of full Age, give him a Releaſe of all Claims they might have on his Eſtate at his Death; or if the Daughter after marry, and her Huſband gives the Father the like Releaſe, ſuch Releaſes are void; and the Reaſon is, becauſe neither of them had any Right or Claim to any Part of the Father's Eſtate till after his Death.

Beckford's Caſe, 2 Rep. n. 359

If a Freeman has but one Child, and he has receiv'd ſome Portion from his Father, and then the Freeman dies, leaving this Child and a Widow;

dow; the Child ſhall have his full Orphan's Part, without any Regard to what he has already receiv'd; for that Advancement in Part is only to be brought into *Hotch-potch* with Children, and not with others, *per Northey.* 2Salk.426

(3.) *Of ſuch Cuſtoms as relate to Executors.*

By the Cuſtom, Probate of Freemen's Wills in *London* is before the Lord Mayor in his Huſtings; and it is a Cuſtom for the Executors of Freemen to give Bond as well in the Court of Orphans, as in the Spiritual Court. Lutch's *Caſe*, 16 Jac. Hob. 247. & Hill 13 Car. 1. S. P. Calthrop 46.

* It is a Cuſtom, if a Contract be made by one Citizen to pay Money to another, and he who made the Contract dies, his Executor or Adminiſtrator ſhall be chargeable therewith, as if it were upon an Obligation. *Snelling *verſus* Norton, 5 Co. 82. Cro. Eliz. 403. 5 Mod 76, 93. *poſt. Peasby Executors.*

† So by Cuſtom, *Bona Notabilia* are to be to the Value of 10*l* in *London*. †*inter* 115.

‖ The Executor of a Freeman, if he does not inſtruct the Apprentice, is liable by the Cuſtom to provide for him, or find him another Maſter. ‖ Walker *verſus* Hull, 11 Lev. 177.

In the Caſe of *Anderſon* and *Redſhaw*, verſus *Duck* and *Chandler*, there happen'd a Loſs of Part of a Freeman's Eſtate by the Inſolvency of his Executor, and the Queſtion was, Whether it ought to be born out of the Teſtamentary Part of his Eſtate only, or out of the whole perſonal Eſtate as well cuſtomary as Teſtamentary, there being no Cuſtom of the City directing how ſuch Loſs *ſhould be born.*

It was decreed in *Chancery* by the Lord Chancellor *Cowper* in *Trin.* Term, 1715, that the Widow and Orphans of a Freeman of *London* are in the Nature of Creditors for two Thirds of the perſonal Eſtate he ſhall die poſſeſs'd of, and that if any Loſs happen by the Inſolvency of his Executors, ſuch Loſs ought to be born by the Legatees of a Freeman entirely out of his Death's Part; ſo that the Widow and Or-

phans may have two full Thirds of the Freeman's Estate, as if no such Loss had been.

4. *Of the Customs relating to Orphans.*

1 Roll. Rep. 316. 1 Roll. Abr. 550.

The Court of Orphans is held before the Lord Mayor and Aldermen, who are Guardians to all Orphans, and it is the Custom, that if any Freeman or Freewoman die, leaving Orphans within Age, unmarry'd, that the Court of Orphans shall have the Custody of their Bodies and Goods, until they attain the Age of Twenty One, unless the Orphan being a Female, shall marry.

Wilkinson *versus* Bolton, 17 Car. 2. 1 Lev. 162. 1 Sid. 250. Raymond 116. Harwoods Case, 24 Car. 2. 2 Lev. 32. 1 Mod. 79. 1 Vent. 178.

And the Mayor and Aldermen commit the Custody of such Orphans to whom they think proper; and if any Person marry such Orphan, being under Age, without the Consent of the said Court, they may lay a Fine on such Person, according to the Quality and Portion of the Orphan; and if such Person refuse to pay the Fine, they may commit him to *Newgate* 'till he submit; but if such Person settle a competent Estate on the Orphan, as the Court shall direct, they, on Petition, *usually remit the Fine.*

The personal Estates of Orphans was formerly paid into the Chamber of *London*, by the Executor or Administrator.

Cap. 10.

But by an Act made the 5th and 6th of *Wm.* 3. *it is provided and enacted, that no Person or Persons whatsoever shall, at any Time, be compelled or obliged, by Virtue of any Custom within the said City, or by any Order or Process of the Court of Orphans, or otherwise howsoever, to pay or deliver into the Chamber of the said City of* London, *any Sum or Sums of Money, or personal Estate, due or to be due, or belonging to any Orphan or Orphans, of any Freeman of the said City, any Law or Usage for inforcing the same notwithstanding.*

Marriage,

Marriage, Conditions annexed to it.

CONditions againſt *Marriage* in general, are void in Law, as if a Legacy of 500 *l.* is given to a Woman *if* ſhe doth not marry, and 300 *l.* if ſhe doth marry; and afterwards ſhe marrieth, ſhe ſhall have the 500 *l.* becauſe the *Condition* annex'd to that Legacy is *void.*

So if a Legacy is deviſed to a Woman, if ſhe doth *not marry ſuch a Perſon*, and if ſhe doth afterwards marry him, the Legacy is void.

By the Civil Law, if a Legacy is deviſed to a Man provided he marry *E. A.* the Marriage muſt take effect, otherwiſe the Legacy is not due; but if it be that he marry with the Conſent of *R. B.* he is obliged to be married, but it may be without ſuch Conſent, unleſs the Legacy is deviſed over to another Perſon; and the Reaſon is, becauſe the Marriage being limited to the *Conſent* of a particular Perſon, if he ſhould refuſe to give Conſent, it would wholly obſtruct the Marriage it ſelf, which is a Thing againſt Law; but if the Legacy had been given, ſo as he marry with the *Advice* of *W. N.* in this Caſe he muſt ask *Advice*, tho' he is not obliged to follow it.

The Father deviſed 500 *l.* to his Daughter, but it was upon Condition, that if ſhe would not marry *R. B.* it ſhould be taken from her and given to him, the Daughter died before ſhe was capable of Marriage, or qualified to give her Conſent. This Condition is only *in terrorem*, and *R. B.* ſhall not have 500 *l.* tho' 'tis deviſed over to him, becauſe there was no Fault in the Daughter, and therefore there ought not to be any Puniſhment. Godb. 51.

A Deviſe of 20 *l. per Ann.* to his Wife, *if ſhe ſhall remain a Widow*; in ſuch Caſe, by the Civil-Law, ſhe is oblig'd to give Security to repay what

ſhe ſhall receive, in Caſe ſhe marry again; but if the Words had been *until* ſhe ſhall be married, or *ſo long* as ſhe ſhall be unmarried, ſhe is not oblig'd to repay what ſhe received, in Caſe ſhe marry a ſecond Huſband.

Force *verſus* Hembling 4 Rep. 61. Goldſ. 109

A Feme Sole deviſed her Land to a Man and his Heirs, whom ſhe afterwards married and then ſhe died without Iſſue; adjudged, That the Marriage was a Revocation of her Will, for that being her own Act, doth amount to a Countermand in Law: But *Goldſborough* reports it otherwiſe, *viz.* that the Marriage was no Revocation.

Clerk *verſus* Thompſon, 2 Cro. 571. *See* Stat. 29 Car. 2. cap. 3. *that an Executor or Adminiſtrator ſhall not be charged, &c. upon any Agreement in Marriage, unleſs put in Writing.*

A Man promiſed, That in Conſideration the Woman would marry him, that he would leave her worth 500 *l.* they married, the Huſband died and did not leave her ſo much, and thereupon ſhe brought an Action againſt the Executor of her Huſband; it was objected, That it did not lie againſt him upon a collateral Promiſe of the Teſtator, or if it did, the Marriage was a Releaſe; and this was the Opinion of my Lord **Hobert*, but adjudged, That it was not a *Duty* in the Life-time of the Huſband, and therefore could not be releaſed by the Marriage, ſo that the Action lay againſt his Executor.

* Smith *verſus* Stafford, Hob. 217.

† Acton *verſus* Gage, Mich. 11. Will'i.

A † Man enter'd into a Bond to a Woman with a Condition, that if he married her, that in ſuch Caſe his Heirs, Executors, or Adminiſtrators ſhould pay her 500 *l.* after his Death; he married her, and the Wife ſurvived. Two Judges againſt the Chief Juſtice *Holt* held, That the Action was not releaſed by the Marriage, becauſe there was no Cauſe of Action during the Life of the Husband, for that did not ariſe till after his Death, and then his Bond remained good to the Wife: But a Writ of Error being brought in the *Exchequer-Chamber* upon the Opinion of the Chief-Juſtice, the Plaintiff in Errors perceiving the Court inclined

inclined to affirm the Judgment, proceeded no farther.

As to Deviſes relating to Dowers or Jointures, I find theſe Caſes:

ſſ. A Deviſe of Lands to his Wife, till his Daughter *Prudence* was Nineteen, and afterwards to his ſaid Daughter in Tail, and that then ſhe ſhould pay to her Mother 12 *l. per Annum for her Life* in Recompence of her Dower, and if ſhe fail'd, that in ſuch Caſe the Mother ſhould have the *Land for Life*, ſhe brought a Writ of Dower before her Daughter was Nineteen; and after ſhe was Nineteen, ſhe enter'd for Non-payment of the *Rent of* 12 *l. per Ann.* Adjudg'd, That by bringing the Writ of Dower, ſhe had wav'd the Benefit to have the Land for Life, and that it was againſt the Intent of the Teſtator ſhe ſhould have both. Goſlin *verſus* Warburton, Cro. Eliz. 128. 1 Leon. 137.

Deviſe of Lands to his Wife generally for her Life, this cannot be averred to be for her Jointure, and in Satisfaction of her Dower, becauſe a Deviſe imports a Conſideration in its ſelf; and as it ſhall not be averr'd to any other Uſe, than to the Deviſee himſelf, ſo it ſhall not be averr'd to be for a *Jointure*, and ſhall not be taken to be ſo, but rather as a Benevolence than a *Jointure*. Leak *verſus* Randall, *cited in* Vernon's *Caſe*, 4 Rep. 4.

An Action was brought againſt a ſingle Woman, who married pending the Suit; adjudg'd, That it was not abated, but that the Plaintiff might ſtill proceed againſt her to Judgment and Execution, and take her in Execution, by the Name in which the Action was commenc'd, notwithſtanding ſhe was now married. Trin. 12. W. B. R.

So if a Woman give a Warrant of Attorney to confeſs a Judgment, and then marries; a Bill may be fil'd, and Judgment enter'd againſt Huſband and Wife. 1 Shower, Rep. 91.

Notice

Notice.

NOTICE, or no Notice, produces divers Effects, in Reſpect of the Perſon to whom it ought to be given; either to free him from ſome Charge, or to make him ſubject to a Forfeiture of his Eſtate, of which I ſhall give the Inſtances following.

Keilw. 51. Plow. Com. 279. Vaugh. 94

ſſ. If an Executor payeth a Debt upon *Simple-Contract*, 'tis good in Diſcharge of another Action againſt him, if he had *no Notice* of other Debts of higher Nature at that Time.

Corbet's *Caſe*, 32 Eliz. 1 Leon. 312

An Adminiſtrator liv'd in one County, and an Action of Debt was brought againſt him and laid in another County; and before he had any Notice of this Action, he paid ſeveral Debts which the Inteſtate ow'd by Specialty, and had not Aſſets left to pay the Debt in Demand, tho' he had Aſſets at the Time of Action brought; and now he appear'd, and pleaded this ſpecial Matter, and concluded, that he had nothing in his Hands; adjudg'd, A good Plea.

Whalley *verſus* Reed, 1 Lutw. 809

So where the Teſtator deviſed his Houſes to his Wife for Life, then to his eldeſt Son and his Heirs, paying to his youngeſt Son 40 *l.* and *failing* his ſaid eldeſt Son, to come to the youngeſt and his Heirs. The Money was not paid; the Queſtion was, Whether the eldeſt Son had forfeited his Eſtate, by not paying the Money without *Notice* given him of his Father's Will? For it ſhall be preſum'd, that being his eldeſt Son he had enter'd as Heir, which is a better Title than he could have by the Will; 'tis true, if the Deviſe had been to a *Stranger*, as he takes *Notice* what Eſtate is deviſed to him; ſo he is oblig'd to take *Notice* upon what Condition 'tis given; but the *Heir at Law* is not bound ſo to do. Therefore

Sir Andrew Corbet's *Caſe*, 4 Rep. 82. *b.* 2 Leon. 60. S. C.

fore *Notice* muſt be given to him of a Condition annex'd to his Eſtate, otherwiſe he ſhall not forfeit it.

Nuncupative-Will.

THIS is where the Teſtator declares his Will before a ſufficient Number of Witneſſes, which being reduc'd into Writing, either before or after his Death, is good to diſpoſe of his *Perſonal Eſtate*, but not his *Lands*.

And by the Statute 29 *Car.* 2. 'tis enacted, That *a Nuncupative Will ſhall not be good exceeding* 30 l. *unleſs proved by three Witneſſes, who were preſent at the making thereof, nor unleſs it was made in the Time of the laſt Sickneſs of the Deceaſed, or in his Houſe, or where he hath been reſident for ten Days before, unleſs ſurpriz'd in Sickneſs from Home, and no Evidence ſhall be given to prove ſuch Will after ſix Months, unleſs it be committed to Writing within ſix Days after the making.* 29 Car. 2. cap. 3.

Neither ſhall any Letters, Teſtamentary or Probate, of ſuch Will paſs the Seal of any Court, till fourteen Days after the Deceaſe of the Teſtator, nor until Proceſs hath iſſued to call in the Widow, or next of Kin, to conteſt it.

Before this Statute it was neceſſary to put the Will in Writing, and to prove it; for the Executor could bring no Action, unleſs the Will was committed to Writing, and proved by a Witneſs, and under the Seal of the Ordinary, tho' not of the Party. 10 Ed. 4. 1. 5 H. 5. 1. 4 H. 6. 1. Fitz Executor 2.

The Plaintiff, as Adminiſtrator, exhibited a Bill to have a Diſcovery, and an Account of the Inteſtate's Eſtate. The Defendant pleaded, That the ſuppoſed Inteſtate made a *Nuncupative-Will*, and another Perſon Executor, and inſiſted, that he was not accountable to the Plaintiff, as Adminiſtrator, 14 H. 6. 5. Verhorn *verſus* Brewin, 1 Ch. Rep 192.

niſtrator, nor to any other Perſon but the Executor; but decreed, That ſuch a Will before Probate, is not pleadable againſt an Adminiſtrator.

Nuncupative Codicile.

By the ſame Statute 'tis enacted, That *no Will in Writing, concerning any perſonal Eſtate, ſhall be repealed, or any Clauſe therein altered by any Words or Will by Word of Mouth, except the ſame be put in Writing in the Life time of the Teſtator, and read to and approved by him, and proved to be ſo done by three Witneſſes*, &c. After the making this Statute *George Stoniwell*, by his Will in Writing, made his Wife Executrix and Reſiduary Legatee, after ſome Legacies paid; but ſhe dying in his Life-time, he made a Codicile by Word of Mouth, and deviſed thereby to *George Robinſon*, all which he had given in his Will to his Wife. This was adjudged, by the Delegates, to be a good Nuncupative-Codicile, and that it was *quaſi*, a new Will, for ſo much as he had given to his Wife; that as to that Matter, it was no Alteration of the Will in Writing, becauſe there was no ſuch Will; for the Operation of it was determin'd by the Death of the Wife, in the Life-time of the Teſtator; ſo that as to the *Reſiduum* deviſed to her, it was utterly void.

Stoniwell's Caſe, Raim. 334.

Ordinary,

IS properly taken for the *Biſhop of the Dioceſe*, or he who hath *Ordinary Juriſdiction* in Eccleſiaſtical Matters for the Execution of Juſtice, but ſubject to the King, and to his Courts of Common-Law.

This Ordinary hath Power in granting and revoking Adminiſtrations; and 'tis a Power which is annex'd to his Perſon, wherever he is, I mean to the Perſon of a *Biſhop*; for there are many other Perſons who have Deputations to grant Adminiſtration, as ſhall be ſhewn under this Title.

Now

Now as to his Power to grant and revoke Administrations, I find some Cases, *viz.* an Executor administer'd, but would not prove the Will; in such Case the Ordinary may grant Administration to another, and he may bring an Action, tho' there is an Executor appointed by the Will; and if such an Administrator should be sued, 'tis no good Plea to say, That the Testator made an Executor, who administer'd and traverse that he died intestate; for the Plaintiff may reply, and shew the special Matter, that Administration was granted to him in Default of proving the Will by the Executor. 4 H. 7. 13.

'Tis true, the Ordinary is bound to grant Administration, and therefore, if Debt is brought against him, and pending the Action he commits Administration, the Writ shall abate. 34 H. 8.

But if two Persons contend which of them is the rightful Executor, in such Case he cannot grant Administration *pendente lite*. Robin's *Case*, Moor 636.

And to shew that this Power is annexed to his Person; if a Bishop of *Ireland* happen to be in *England*, he may grant Administration here of any Thing within his Dioceſe in *Ireland*. But the granting an Administration is only an *Authority* given to another, which is *revocable* in its Nature. Carter *versus* Cross, Godb. 33.

As if Debt is brought against an Administrator, and pending the Action, the Ordinary grants Administration to another; this may be pleaded in Abatement to the Action, because the granting the Administration was only an *Authority*, and the Administrator is but a Servant to the Ordinary, whom he may change at any Time, and there is no Occasion for a formal Sentence of Revocation, but the *Ordinary hath Power to revoke it without such Sentence. 27 H. 8. 26. *See* Tit. Administrator. *ante* 18. *contra.* Newman *versus* Bromond, Owen 50. * 1 And. 303.

Where

6 H. 5. 6. 35 H. 6. 31. Where an *Adminiſtrator is Plaintiff*, he muſt ſhew by whom Adminiſtration was granted to him, becauſe he hath the Power by Virtue of ſuch Commiſſion; but where he is Defendant, in ſuch Caſe the Plaintiff need not ſet forth by whom the Adminiſtration was granted to him, for it ſhall be intended it was by the Ordinary, tho' in ſome of the Year Books it is otherwiſe, *viz.* that the Plaintiff muſt ſhew how that the Defendant was Adminiſtrator, *viz.* that ſuch a Perſon died inteſtate, and that Adminiſtration was committed to him by the Ordinary; but what the Law is as to this Matter, may be ſeen in the Caſes following, where I ſhall mention the ſeveral Perſons who have Power to grant Adminiſtrations.

9 H. 5. 6. Fitz. Adm. 10.

44 E. 3. 16. Fitz. Adm. 15.

The King,	*Doctors of Divinity,*
The Archbiſhops,	*Officials,*
Archdeacons,	*Surrogates,*
Commiſſaries,	*Stewards of Courts,*
Deans,	*Vicars General.*

Hobſon *verſus* Wills, Allen 53. And firſt, as to the King: Debt was brought againſt an Adminiſtrator, ſetting forth, that Adminiſtration was committed to him *per Carolum Regem* without ſaying *Debito modo*. And upon Demurrer to the Declaration it was held good, becauſe the King hath univerſal Juriſdiction.

Dorrel *verſus* Collins, Cro. Eliz. 6. 456. S. P. An Adminiſtrator was Plaintiff, ſetting forth that Adminiſtration was granted to him by the *Archbiſhop*, but did not ſhew *how* either as *Ordinary*, or by Virtue of his *Prerogative*, yet it was held good; for the Plaintiff need not ſhew that it was by reaſon of his *Prerogative*, or that the Inteſtate had * *Bona Notabilia*, for if he had not, it ought to be ſhew'd by the Defendant.

* 4 Leon. 189.

†Dring *verſus* Reſpaſſe, 1 Sid. 302. 1 Lev. 193. † An Adminiſtrator was Plaintiff, and ſet forth, that Adminiſtration was committed to him by

R.

R. B. Archdeacon of *Norfolk*, and did not ſay *Loci iſtius Ordinarium*; this was held well enough upon a general Demurrer; for 'tis not neceſſary to ſhew the *Juriſdiction* of an *Archdeacon* no more than of a *Biſhop*.

But *Twiſden*, Juſtice, ſaid, the Law was, That in a *Plea in Bar* the Omiſſion of thoſe Words had been ill, not only upon Demurrer to ſuch Plea, but even after a Verdict, but that it was otherwiſe in a Declaration, if the Defendant demur ſpecially, and ſhew it for Cauſe.

'Tis true, many Years before, there were different Opinions as to this Matter, for Serjeant *Rolls* tells, That a Judgment was arreſted for the Omiſſion of theſe Words, but this muſt be upon the firſt Motion; for the Court chang'd that Opinion, and held, that the Plaintiff need not ſet forth the *Authority of an *Archdeacon*, becauſe he is *Oculus Epiſcopi*, and he is to commit Adminiſtration *de Jure Ordinario*. Chiberton *verſus* Trudgeon, 2 Roll. Rep. 124. 150. 2 Cro. 556 Palm. 97. * Stiles 54. S. P.

The Defendant ſet forth, that Adminiſtration was granted to her by a *Commiſſary* of a *Biſhop Legitime Conſtitutum*, and upon a Demurrer to this Plea, it was held good; for in ſuch Caſe 'tis as well as if it had been granted by the *Biſhop* himſelf. Walford *verſus* Savill, 1 Lutw. 9.

But where the Plaintiff declar'd, that the Adminiſtration was committed to him by the *Dean* of *Litchfield*, and did not ſay by what Authority, nor that he was *Loci Ordinarius*; this was held naught, becauſe it ſhall not be intended he had any Juriſdiction as a *Biſhop* or *Archdeacon*, unleſs 'tis ſet forth. Temple *verſus* Temple, Cro. Eliz. 791.

So where the Plaintiff declared, That Adminiſtration was committed to him by *Andrew Vane ſacræ Theologiæ Doctorem*, without ſaying, *Loci iſtius Ordinarium*, or *cui de Jure pertinuit*, &c. this was held ill after a Verdict, for it being in a Morgan *verſus* Williams, Cro. Eliz. 431. Moor 367.

Decla-

Declaration, which ought to be certain, the Juriſdiction of a Doctor of Divinity ſhall not be intended.

16 & 17 Car. 2. cap. 8. Maſon *verſus* Hauſon, Shore 355. 4 Mod. 133 Gidley *verſus* Williams, 1 Salk. 36. S. P.

But now by the Statute 17 *Car.* 2. this Omiſſion is aided by a Verdict; as for Inſtance: An Adminiſtrator declared, that Adminiſtration was granted to him by *R. B.* Surrogate and Official of *D. D.* Prebendary of the Prebend of *C.* and did not ſay, *cui adminiſtratio de jure pertinuit, &c.* this is aided by a Verdict, and ſo is the Omiſſion of a *Profert hic in Curia, &c.*

* Daws *verſus* Harriſon, 2 Mod. 65.

*About twelve Years before the making this Statute, an Adminiſtrator declar'd, that an Adminiſtration was granted to him by the *Official* of the *Biſhop* of *Carliſle*, without ſaying, *Loci iſtius Ordinarium.* And upon a *Demurrer* to the Declaration it was held good; for it not being in a Peculiar, his Juriſdiction ſhall be intended.

And many Years before in Trover, the Plaintiff declar'd, That Adminiſtration was granted to him by *R. B. Official* to the *Biſhop* of *Peterborough*, without ſhewing by what Authority, and this likewiſe was held good after a Verdict.

Lucy *verſus* Smith, Cro. Eliz. 102.

An Adminiſtrator brought an Action of Debt againſt an Executrix, ſetting forth, that her Teſtator became bound to *R. Clegg* in 200 *l.* that the Money was not paid to the ſaid *Clegg* in his Lifetime, nor to the Plaintiff, who married his Widow, to whom Adminiſtration *de Bonis non, &c.* was granted by the *Steward of the Mannor of* Mansfield, *cui Commiſſio Adminiſtrationis illius de Jure pertinuit*, and concludes with a *profert in Curiâ*; this was held a good Declaration.

* Burbridge *verſus* Cleyton, 1 Lutw. 408

*So where an Adminiſtrator declar'd, That Adminiſtration was committed to him by *Will'm Lewen Vicarium Generalem in Spiritualibus Epiſcopi Roffen.* Adjudg'd, That the Vicar-General *in Spiritualibus* amounts to a *Chancellor*; and this being

Gillam *verſus* Lovelace, 1 Leon. 312.

in

in a *Declaration*, the Omiſſion of *Loci iſtius Ordinarium* is well enough, which had been otherwiſe in a *Plea*.

Upon the whole Matter, where the Adminiſtrator is Plaintiff, he may declare that Adminiſtration is committed to him by a Biſhop, or by an Archdeacon, tho' he doth not ſay *Loci iſtius Ordinarium*, 'tis well enough, for they ſhall be intended to be Ordinary of the Place.

Neither is it abſolutely neceſſary, That he ſhould declare, in a *particular Manner*, by whom it was granted; for 'tis ſufficient to ſay, That * *Debito modo Commiſſa fuit* to him, this was after a *Verdict*, but it had been otherwiſe upon a *Demurrer*.

† But he muſt ſhew *it was committed to him*, tho' he need not ſay *by whom*; as where an ‖ Adminiſtrator *durante minore ætate cum Teſtamento annexo* was Plaintiff, but did not ſet forth in his Declaration, that Adminiſtration was committed to him; 'tis true, he concluded with a *profert hic in Curiâ Literas Teſtamentarias*, without ſaying *Literas Adminiſtrationis*, but that was not aided by the Statute, tho' the Plaintiff had a *Verdict*, becauſe he had not entituled himſelf to the Action.

‡ But where an Adminiſtrator *is Defendant*, in ſuch Caſe the Plaintiff need not ſhew, that Adminiſtration was committed to him by the Ordinary; for if 'tis not ſo, the Defendant ought to ſhew it.

* So where Debt was brought againſt an Executor, who pleaded, that the ſuppoſed Teſtator died inteſtate, and that Adminiſtration was granted to another, and that the Defendant, as his Servant, ſold the Goods to render an Account, and travers'd, that he adminiſter'd in any other Manner; this is not a good Plea, without ſhewing, that he

Clementſon *verſus* Monford, Stiles 106. S. P. Chard *verſus* Bird, Cro. Eliz. 838. Kidmore *verſus* Winſton, Cro. Eliz. 879. Woodward *verſus* Thompſon, Cro. Eliz. 907, 876. * Marſhall *verſus* Ledſham, Stiles 236, 282. † Cheeſman *verſus* Lintot, Mich'as 6 Will'i S. P. ‖ Lake *verſus* Thacker, T. Jones 193. ‡ 11 H. 4. 72. * 1 H. 6. 13.

who granted the Adminiſtration was *Loci iſtius Ordinarius.*

Outlawry relating to Teſtator and Executor.

21 H. 6. 30. Fitz. Executor 11.

IF an *Executor* is outlaw'd, yet he may maintain an Action; but if the *Teſtator* is outlaw'd, and an Action of Debt is brought againſt *his Executor*, 'tis a good Plea for him to ſay, that his Teſtator is outlaw'd; the Reaſon ſeems to be, becauſe all his Goods are forfeited to the King, and ſo the Executor may have nothing to ſatisfy the Debt.

Woolley *verſus* Bradwell, Cro. Eliz. 875.

But *Anno* 38 *Eliz.* upon a Demurrer to ſuch a Plea, it was adjudg'd otherwiſe, becauſe there may be Debts due to the *Teſtator* upon *Contract*, and ſuch Debts are not forfeited, or he may make a Will and deviſe Lands to be ſold by his Executor, which he may have ſold, and the Money is Aſſets in his Hands; 'tis true, one Judge held the Plea good *prima facie*, and that ſuch Aſſets ought not to be *intended*, but *ſhewn.*

Shaw *verſus* Cutteris, Cro. Eliz. 890.

About five Years afterwards, in an Action of Debt brought againſt an Adminiſtrator, he pleaded, that the Inteſtate was outlaw'd and taken upon the *Capias*, and committed and died in Priſon; and upon Demurrer it was adjudg'd no good Plea, becauſe a Man may be an Adminiſtrator to a Perſon outlaw'd, as if Goods are unlawfully taken from him before the Outlawry, he may bring an Action of Treſpaſs, and recover the Value of the Goods, which ſhall be Aſſets in his Hands.

Bullen *verſus* Jervis, Hutt. 53.

Debt againſt an Adminiſtrator upon the Bond of the Inteſtate, the Defendant pleaded in Bar, that the Inteſtate was outlaw'd after Judgment, and

and died, and that the Outlawry was ſtill in Force; but it was adjudg'd no good Plea, becauſe 'tis only a Plea by Implication, for by pleading the Outlawry, 'tis implied the Inteſtate had no Goods but what were forfeited, which may not be true, becauſe he may have Goods which are not forfeited; as if the Inteſtate had a Rent-Charge granted to him for Life, and is afterwards outlaw'd, and then the Rent is Arrear, and he dies, his Adminiſtrator ſhall have theſe Arrears; for the Rent was Freehold, and no Action of Debt lay for it during his Life, and therefore the Arrears are *Aſſets*.

The Teſtator was outlaw'd in Felony, and his Executor brought a Writ of Error to reverſe it. *Goldsborough* tells us, it was objected by the *famous Coke* (as he calls him) that a Man attainted of Felony could not make Executors; but if he could, an Executor ſhall have only a Writ of Error upon a Judgment in a perſonal Action, but an Attainder is of a higher Nature, and effects the Reality; but it was adjudg'd, that an Executor might have a Writ of Error, becauſe his Teſtator might not be lawfully outlaw'd, and ſo the Writ is brought to remove that Diſability, and 'tis probable he might have only Goods, and no Lands; and if ſo, and he was not duly outlaw'd, then the Executor may loſe all the Goods, if this Writ of Error did not lie, and therefore *Leonard* reports, that it was adjudg'd to lie. And my Lord *Coke*, in *Foxley*'s Caſe, cites it as ſo adjudg'd. March's *Caſe*, 1 Leon. 325. Cro. Eliz. 273.

The Creditors of *W. R.* exhibited a Bill in *Chancery* for their Debts, ſome of which were on Mortgage, ſome on *Judgments*, and one was upon a Bond. *W. R.* was *outlaw'd*, and one of the Judgment Creditors brought an Action of Debt on his Judgment, and the Queſtion being, which of theſe Debts ſhould be firſt paid, it was decreed, 5 Rep. 111 Erby *verſus* Erby, 1 Salk. 80.

that the Outlawry being upon Meſne Proceſs, and before Judgment, did not alter the Nature of the Debt, and create a Charge on the Land; but that where is an Outlawry, and a Seizure thereon, there the Debt attaches on the Land, and ſhall take Place of a Judgment, tho' prior to the Outlawry. That the bringing an Action by the Plaintiff upon this Judgment, did not put it behind other Judgments, neither was it a waving the Charge on the Land, becauſe the bringing the Action was the Account of the Attorney, and there was no other Remedy at Common-Law after the Year and the Day.

Paraphernalia.

See *Chattels* 151.

THIS is a compound of two *Greek* Words, *viz.* *Para ſuper* and *Pherna Dos*, which ſignifies ſomething which a Woman is to have above her Dower, and this is neceſſary *Apparel*, and ſuch which is ſuitable and convenient to her Degree.

18 Ed. 4. 11. 37 H. 6. 28. 1 Roll. Abr. 911.

If the * Huſband deliver a Piece of Cloth or Silk to his Wife to make a Garment, and dies before 'tis made, ſhe ſhall retain it againſt his Executor, but not againſt his Creditors, becauſe ſhe had it by the actual Delivery of her Huſband.

* Harwell *verſus* Harwell, 1 Roll. Abr. 911.

But tho' ſhe had it not by the Delivery of her Huſband, yet if ſhe had it in her Cuſtody at the Time of his Deceaſe, and it was *neceſſary and convenient* for her Uſe, ſhe ſhall retain it.

Antea 151 Chattels,

As for Inſtance, the Lord *Audley*'s Widow married Serjeant *Davis*, and before and after her Marriage ſhe uſually wore a Chain of Diamonds and Pearls, the Serjeant devis'd the *Uſe* thereof to her during her Widowhood, ſhe giving Security to leave them to his Daughter, the Court was divi-

Haſtings *verſus* Dowglas, Cro. Car. 343.

ded,

ded, whether ſhe ſhould retain them as her *Paraphernalia.* Two Judges held ſhe might, becauſe they are *convenient* for a Woman of her Quality, but two were of another Opinion; for tho' they might be *convenient*, they were not *neceſſary*, and therefore ſhe ſhould not retain them againſt the Deviſe of her Huſband; yet *Jones*, who reports the ſame Caſe, tells us, That by the Opinion of three Judges, the Wife ſhall retain her *neceſſary and convenient* Apparel and *Ornaments* againſt the Deviſe of her Huſband; and that he cannot diſpoſe them by Will, tho' he might have ſold them in his Life-time, for upon his Death the Property is veſted in the Widow.

The Executor of the Viſcount *Bindon* brought Detinue againſt the Defendant, and declar'd againſt her for detaining certian Jewels. The Defendant juſtify'd the detaining as *Paraphernalia*; adjudg'd, That they ought to be allow'd to a Widow, having Regard to her Degree, and in this Caſe the Huſband of the Lady *Bindon* being a Viſcount, theſe Jewels, being of the Value of 500 *l.* may be allow'd to her. *Viſcounteſs Bindon's Caſe*, 2 Leon. 166.

Peculiar.

THIS is a particular Pariſh or Church, which is exempted from the Juriſdiction of the Ordinary of the Dioceſe, and hath Power within it ſelf to grant Adminiſtrations or Probates of Wills, and theſe are of ſeveral Sorts.

Royal Peculiars which are the King's free Chapels, and are ſubject only to his Juriſdiction.

Archbiſhops Peculiars, which are diſperſed in ſeveral Dioceſes; for it is an ancient Privilege of the See of *Canterbury*, that wherever any Mannors or Advowſons do belong to that Church, they forthwith become exempt from the Juriſdiction

of the Ordinary of the Dioceſe where thoſe Mannors, *&c.* are, and are reputed *Peculiars* under the Juriſdiction of the Archbiſhop.

The *Peculiars* of *Deans* and *Chapters*, which are certain Places where, by ancient *Compoſitions*, the Biſhops had parted with their Juriſdiction to thoſe Men; and if ſuch *Compoſitions* are loſt, then long and continual Uſage to grant Adminiſtrations and Probates of Wills, will run into a Preſcription and give them a good Title, and ſuch are the *Dean and Chapter of* Paul's *and of* Litchfield.

Peculiars belonging to *Monaſteries*, and this was a Juriſdiction obtain'd by the richer Monaſteries either from Biſhops or the Pope, and all theſe had Power to grant Adminiſtrations.

Mich. 35 H. 6. 46. Fitz Adm. 5. And when an Adminiſtration is granted by any of theſe Peculiars, the Plaintiff need not ſet forth how it came by that Juriſdiction, either by *Preſcription* or *Compoſition*; for 'tis ſufficient that he alledge them to be *Loci iſtius Ordinarios.*

Perſonal Eſtate: See *Tit. Chattels*, Tit. *Deviſe of Goods.*

Pleas by Executors.

The uſual Pleas by Executors are,

(1.) *That he never adminiſter'd as Executor.*
(2.) *That one Security is accepted for another.*
(3.) *That the Executor is miſnam'd.*
(4.) *That he is not anſwerable for a Tort of the Teſtator.*
(5.) *Theſe Pleas muſt be certain, both as to the Perſon and Thing.*
(6.) *The Defendant muſt aver his Plea, and cannot wave a Term.*

21 H. 6. 19. (1.) WHERE an Executor pleads, That he *never adminiſter'd as Executor.* 'tis not good if he doth not likewiſe plead, that *he is not Executor*, nor

nor *adminiſter'd as Executor*; for by ſaying only, that he *never adminiſter'd as Executor*, he doth not deny that he was Executor.

Debt was brought againſt an Executor, who pleaded, that *he was not Executor, nor adminiſter'd as Executor.* The Plaintiff reply'd, he did adminiſter as Executor. And the Evidence was, that Adminiſtration of the Goods of the Deceas'd was granted to him, which he adminiſter'd as an Adminiſtrator; and this was held good, tho' the Defendant might have pleaded it in Abatement to the Writ, which nam'd him Executor. Dyer 305.

So where an Executor pleaded, he was not the ſame Perſon *nam'd* in the Writ; upon a Demurrer this was held an ill Plea, becauſe he might be Executor *de ſon Tort*; and therefore he ought to have pleaded, That he was *not Executor, nor ever adminiſter'd as Executor.* Seaman *verſus* Edwards, Stiles 63.

(2.) *Where the ſecond Security is better than the firſt, an Executor may plead it in diſcharge of the other, as for Inſtance:* Debt upon Bond againſt the Defendant as *Heir* of the Obligor, he pleaded, that his Father died inteſtate, and that *R. B.* had adminiſter'd, and that the ſaid Adminiſtrator had given the Plaintiff another Bond in full Satisfaction of the former; adjudg'd, That if the ſecond Bond had been given by the *Obligor himſelf*, it would not have been a Diſcharge, but being given by the *Adminiſtrator*, the Security is better'd, for now he is chargeable *de Bonis Propriis.* Blythe *verſus* Brittells, 1 Mod. 225

About three Years afterwards there ſeems to be a contrary Reſolution, *viz.* Debt on a Bond, the Defendant pleaded an Agreement between them, that he ſhould give the Plaintiff a new Security for his Debt, and that he being the Executor of the Obligor, gave a Penal Bill for the ſame; adjudg'd, This was no good Plea, becauſe one Bond cannot be given in Satisfaction Lobly *verſus* Gildard, 3 Lev. 55

for another, tho' the new Bond did oblige him *de Bonis Propriis*, and the other only *de Bonis Teſtatoris*.

Barker *verſus* Dye, 3 Lev. 269.

But where an Execution is executed, that may be pleaded in Bar by the Executor, as *Aſſumpſit* againſt the Defendant, as Adminiſtratrix of her Huſband, ſhe pleaded, that he was bound in a *Statute* to one *Cordell* for 2000 *l. pro vero & juſto Debito minimé ſoluto.* The Plaintiff reply'd, That *Cordell* had ſu'd out an Extent, and upon a *Libertate* had got Poſſeſſion of the Lands, which he accepted, *&c. prout patet per recordum.* This is a good Replication, becauſe *Cordell* was concluded by the Acceptance of the Land upon the *Liberate*, to have any other Execution upon the Goods of the Inteſtate, and ſo the Adminiſtratrix is not chargeable.

Johnſon *verſus* Young, 2 Lutw. 453. S. P.

And here it may not be improper to ſhew ſome Pleadings, wherein other Debts have been preferable to Bonds.

Newport *verſus* Godfry, 3 Lev. 267. 4 Mod. 44. 2 Vent. 184.

As Debt for *Rent* upon a Leaſe Parol brought againſt the Executor of the Leſſee, and for three Years Rent after the End of the Term. The Defendant pleaded a *Bond* which the Teſtator ow'd, and that he had not Aſſets *ultra* 5 *l.* to ſatisfy that Bond; and upon Demurrer this was adjudg'd no good Plea, becauſe the *Rent* did ſavour of the Realty, and was preferable to the *Bond* Debt, and that the Determination of the Leaſe made no Alteration of the Contract, but that the Action might be maintain'd, by Reaſon of the Profits of the Land which the Teſtator had receiv'd.

Snelling *verſus* Norton, Cro. Eliz. 409. 5 Rep. 82.

And long before this Caſe, an Adminiſtrator pleaded the Cuſtom of *London* to an Action of Debt on a *Bond, viz.* that his Inteſtate being a Citizen, made a Contract to pay Money to another Citizen; and that by the Cuſtom he is chargeable with ſuch Contract, as if it had been a Debt

on

on *Bond*, and that he had not Aſſets *ultra*. And upon Demurrer this was adjudg'd a good Plea, for a Debt upon *Simple-Contract* is as much a Debt as what is due on *Bond*, only the Law hath given a Priority to one in Point of Payment, but the Cuſtom being reaſonable makes it a Law, and by Conſequence this Debt equal to the Bond.

'Tis true, an Action of *Debt* upon a Simple-Contract of the Teſtator, doth lie againſt his *Executor* by the Cuſtom of *London*: But now by the Statute of Frauds, *no Action ſhall be brought againſt an Executor or Adminiſtrator, upon any ſpecial Promiſe to anſwer Damages out of his own Eſtate, unleſs tis put in Writing by the Party, or by one authoriz'd by him.* 29 Car. 2. cap. 3.

Aſſumpſit againſt an Adminiſtrator, who pleaded, that on ſuch a Day the Inteſtate gave Bond of 40 *l.* to pay the Money at *Michaelmas*, *&c.* and that he had fully adminiſter'd all the Goods of the Inteſtate, *&c.* except to ſatisfy that 40 *l.* and upon Demurrer this was adjudg'd a good Plea, and that a Debt upon a *Contract* ſhall not be paid before a Debt on a *Bond*, which is not due till a Time to come. Buckler *verſus* Brook, Cro. Eliz. 315.

(3.) *An Executor cannot plead a Miſnoſmer* after an *Imparlance*, as where Debt was brought againſt him, and he *imparled*, and afterwards pleaded a *Miſnoſmer*, *viz.* That he was *Adminiſtrator cum Teſtamento annexo*, and not *Executor*, and that he ought to be ſo nam'd. And upon a Demurrer the Plea was held ill, becauſe 'tis never allow'd to be good after an *Imparlance*. Fiſher *verſus* Jefferies, Stiles 385.

But this muſt be intended of a Plea in *Bar*, for it may be pleaded in *Abatement* after an *Imparlance*; as where Debt was brought againſt the Defendant as Executrix to her Huſband, ſhe *imparled*, and then pleaded in *Bar*, that her Huſband died Inteſtate, and that Adminiſtration was granted Grandvell *verſus* Sibly, 2 Lev. 190.

granted to her, and travers'd, that she was Executrix, or ever administer'd as Executrix. And upon a Demurrer the Plaintiff had Judgment, for the Plea was only a *Misnosmer* of the Defendant as *Executrix* instead of *Administratrix*, which ought to have been pleaded in *Abatement*, and not in *Bar* to the Action; for she had admitted herself chargeable with the Action, but in another Manner, tho' it was insisted, that this was no more than a Plea in *Abatement*, for it was no *Bar* to the Right; but 'tis such a *Bar* to the Plaintiff, that he shall never charge her as Executrix.

(4.) *In many Cases an Executor is not liable to make Satisfaction for a Wrong done by his Testator.*

Bailie *versus* Brittels, Raim. 71.

As where the Plaintiff deliver'd a Cow to the Testator to keep, who sold it, and converted the Money to his own Use. An Action on the Case was brought against his Executor, to which he pleaded, and the Plaintiff had a Verdict, but could never get Judgment, because it was a *Tort*, which died with his Person, it was a meer Trespass, or rather a *Trover* which began in his Life-time.

Tooley *versus* Windham, Cro. Eliz. 206. 2 Ch. Rep. 217.

And so it was adjudg'd *Anno* 33 *Eliz.* That if a Testator wrongfully take the Profits of any Land, his *Executor* shall not be liable, for 'tis a *Tort* which dies with his Person: But a Court of Equity will make him liable so far as the personal Estate extends.

Weeks *versus* Trussel Raim. 95. 1 Sid. 181.

There was a Suit in the Spiritual-Court against the Testator, for double Damages for not setting forth his Tythes, pending which Suit he died; and it was afterwards brought against his Executor for the double Damages, and adjudg'd, that it did not lie, for it was a personal Wrong, and died with his Person. See Sir *Brian Tuck's* Case 55.

* Browning *versus* Litton, 1 Lev. 177.

(5.) *The Plea of an Executor must be certain as to the Person*, as where an * *Assumpsit* was brought against him upon a Promise of the Testator, and upon

upon *Non Aſſumpſit* pleaded, the Plaintiff had Judgment; it was objected, that the Defendant ſhould have pleaded that his *Teſtator Non Aſſumpſit*, but it ſhall be intended the Teſtator, becauſe no Body elſe was charg'd with promiſing.

It muſt be certain as to the Thing, as where the Executor of *R. B.* was ſued on a *Bond* of the Teſtator, he pleaded *non eſt Factum ſuum.* It was inſiſted this was not a good Plea, becauſe the Word *ſuum* muſt refer to the Executor, and he was not charg'd of entering into the Bond; but adjudg'd good, for it ſhall relate to that which may reaſonably make the Plea good; and therefore it ſhall be intended to relate to the Teſtator. Baker's *Caſe*, Latch. 125

So where Debt was brought againſt an Adminiſtratrix upon the Bond of her Huſband for Performance of Covenants, reciting that the Plaintiff being poſſeſs'd of a Leaſe, convey'd her Intereſt therein to the Inteſtate, paying a yearly Rent, and alſo reſerving to herſelf every Year 200 Furze or Wood Faggots. The Defendant pleaded Performance. The Plaintiff reply'd, That he had not 200 Faggots yearly of *the Inteſtate*, but that 800 were due from *the Inteſtate and from the Defendant*, after the Death of the Inteſtate for four Years. And upon Demurrer the Defendant had Judgment, becauſe the Plaintiff had not ſhew'd how many were due in the Life-time of the Inteſtate, and how many after his Death, for the Defendant might plead diſtinct Matters in Excuſe. Tuckerman *verſus* Tuckerman, 1 Lut. 334.

(6.) *And as the Plea muſt be certain both as to the Perſon and Thing, ſo the Defendant muſt aver his Plea.*

As Debt againſt an Executrix upon a Bond of the Teſtator, to pay 25 *l.* at or upon the firſt Day of *May*, *Anno* 2 *Jac.* The Defendant craved Oyer Papworth *verſus* Stacy, 1 Lut. 15.

Oyer of the Original, which was *Teſte* 17 *April* in the ſame Year, and then pleaded in *Abatement*, that the Teſtator was *living* on that Day, but did not aver her Plea, *viz. & hoc parat' eſt verificare unde petet judicium*; 'tis true, this was held to be only Matter of Form, of which no Advantage could be taken upon a general Demurrer, but 'tis otherwiſe upon a ſpecial Demurrer.

Little *verſus* Plant, 3 Lut. 20.

So Debt againſt an Adminiſtratrix upon a Bond of her Huſband who dy'd Inteſtate; the Defendant pleaded in *Abatement*, that her Huſband made a Will, and his Son an Infant Executor, and that Adminiſtration, with the Will annexed, was granted to her *durante minore ætate* of the Son, *unde ex quo, &c.* and becauſe ſhe did not *aver* her Plea, it was held ill upon a ſpecial Demurrer.

Page *verſus* Denton 1 Vent. 354

Debt againſt an Executor, who pleaded, That the Teſtator was indebted to him on Bond, with a Condition to pay Rent; and that at the Time of his Deceaſe there was 300 *l.* due for Rent, and that he had no more than 60 *l.* Aſſets to pay it. The Plaintiff reply'd, There was but 30 *l.* due for Rent at the Death of the Teſtator, and this was held a good Replication, though the Bond was forfeited at that Time, and ſo the Penalty due for Non-payment of the Rent; for the Defendant ought not to take more than is juſtly his due.

Paul *verſus* Moody, 2 Roll. Rep. 131.

In Debt for Arrears of Rent upon a Leaſe made and aſſign'd to the Teſtator, the Defendant pleaded, That after the Death of the Teſtator, *non intravit in ten'ta præd'*, but left the Poſſeſſion *& nulla proficua inde recepit.* And upon Demurrer this was held an ill Plea, becauſe the Executor cannot wave the Term; for when he hath agreed to be Executor, (which is the Principal) he agrees to all the Acceſſaries to it; for otherwiſe he would be but an half Executor, *viz.* by agreeing to one Part,

Part, and disagreeing to another: If the Rent should be more than the Land is worth, he might have pleaded it Specially, and might have been discharg'd that Way: *Quere.*

Plene Administravit.

See *Assets* 103. See *Bonis Propriis* 124, 126. See *Co-Executors* 164. See *Judgments* 372.

THIS is often pleaded, but many Times the Pleas are wrong; I shall therefore shew,

(1.) *Where such Plea is good, and where not.*
(2.) *What Judgment and Executions shall be upon such Pleas.*

(1) 'Tis no good Plea unless the Defendant plead, that at the *Time of the Writ purchased* he fully administer'd. 5 H. 5. 10.

If he plead *plene administravit*, and that *non habuit aliqua Bona & Catalla Testatoris die impetrationis brevis, &c.* this is double.

Upon such a Plea the Defendant cannot give in Evidence that he paid *Debts upon Contracts* made by the Testator, because he is not oblig'd to pay such Debts.

Neither is it a good Plea in an Action of Debt for *Rent*, brought against an Administrator in the *Debet* and *Detinet*. Austin *versus* Miller, 1 Sid. 334.

*Debt against an Executor, who pleaded *plene administravit*. The Plaintiff reply'd, Assets *at the Day of the original Bill, viz. such a Day*, and thereupon they were at Issue, which was to be try'd in *Middlesex*, and the *Bill of Middlesex* being the Original, the Plaintiff was requir'd to produce it, which in Truth ought not to be given in Evidence, * Rogers *versus* Rogers, 1 Sid. 226.

dence, and not producing it he was Nonsuit, and could never get a new Trial, he ought to have tender'd a Bill of Exception upon the Evidence.

Bradly *versus* Hutchinson, Raim. 230. Stiles 328.

Judgment against the Testator in Debt, and a *Sci' Fac'* against his Executor, who pleaded *plene administravit* generally, this is no good Plea.

Newman *versus* Massy, S. P.

† But where Debt was brought against an Administratrix, who pleaded that *W. N.* had obtained a Judgment against her for 100 *l.* and that she had fully administer'd, and had not Goods in her Hands, *tempore brevis originalis, nec tempore judicii, nec unquam postea, præterquam Bona & Catalla non attingentia* to 5 *l.* Now though the Value of the Goods is not made certain by this Plea, yet that is not material, because 'tis but Matter of Form; for if the Plaintiff had prov'd that the Defendant had 100 *l.* instead of 5 *l.* he could have got nothing; therefore the Substance appearing in the Plea, that he had not above 5 *l.* to satisfy the Debt of 100 *l.* the Plaintiff cannot recover, neither is there any Repugnancy in the Plea; 'tis true, the Defendant pleaded *plene administravit*, and afterwards confess'd 5 *l.* not administer'd, but the *præterquam* sets that Matter right, and the *unquam postea* refers not only to the next Antecedent, which is *tempore Judicii*, but also to the Time of the Original *brought*.

† Moon *versus* Andrews, Hob. 133. 218.

Hewlet *versus* Framingham, 3 Lev. 28.

Assumpsit against an Executor, who pleaded several Bonds of the Testator not satisfy'd, and that *plene administravit*, all the Goods which the Testator had at the Time of his Death, & *quod ipse nulla habet Bona vel Catalla Testatoris, vel habuit die impetrationis brevis pred', vel unquam postea, besides* Goods and Chattels to the Value of 10 *l.* which are not sufficient to satisfy the Debts due on the said Bonds which stand charg'd therewith; adjudg'd, This would have been a good Plea, if that

Sentence

Sentence had been added, but being omitted, it made the Plea ill; for *plene adminiſtravit*, as 'tis here pleaded, relates to the *Time* when it was pleaded, and that after the Purchaſe of the Writ, and before that Plea pleaded, he might pay Debts upon Simple-Contract, which Payment he might have given in Evidence at the Trial, if Iſſue had been join'd upon *plene adminiſtravit*, and therefore the Plaintiff had no Remedy but to demur.

By pleading *plene adminiſtravit* to an Action of Debt on a *Bond*, the Debt is admitted; but not an Action on the Caſe, or to an *Indebitatus Aſſumpſit*, and in proving ſuch Plea to an Action of Debt on a Bond, if the Defendant gives Evidence that he paid a Debt on another Bond, he muſt prove that ſuch other Bond was ſealed and deliver'd; but if 'tis pleaded to an Action of Debt upon Simple Contract, he need only prove Payment, becauſe where there is no Bond, 'tis a good Adminiſtration to pay any Debt; but if an Action is once brought againſt an Executor on a Bond, he ſhall not pay a Debt upon another Bond.

Sanderſon verſus Nicholl, 1 Shore 81.

Pemberton verſus Burham, p. 29 Eliz. Dyer 32. 4 Rep. 60.

(2.) *Then as to the Judgment and Execution, the Caſes are as follow, viz.* The Defendant pleaded *plene adminiſtravit*, and it was found againſt him that he had Aſſets in his Hands, tho' not to the Value of the Debt in demand; yet the Judgment ſhall be, that he recover the whole Debt, but he ſhall have Execution only of what is found; but if afterwards he hath more Goods of the Teſtator, then the Plaintiff may have a *Sci' Fac'* upon that Judgment.

46 Ed. 3. 9, 10.

And ſo it was adjudg'd many Years afterwards, where a Writ of Error was brought upon ſuch a Judgment, and it was affirm'd in the *Exchequer-Chamber*; for the Plaintiff ſhall recover the whole Debt, and may have a *Sci' Fac'* upon that Judgment, when more Aſſets come to the Hand of the

Waterhouſe verſus Woodhouſe, Cro. Eliz. 592.

the Executor. And my Lord *Coke* tells us in *Mary Shipley*'s Case, this is the best Form, and that 'tis more agreeable to Law to have Judgment for the *Whole* than *Part of* the Debt.

But the Judgment in such Case, must be to recover the Debt *de Bonis Testatoris*, whereas if he had pleaded *ne unques* Executor, it would have been *de Bonis Propriis*, and general Damages, and the Plaintiff might have a *Casa* for such Damages.

11 H. 4. 5. 40 Ed. 3. 15. 21 H. 6. 40. 34 H. 6. 22, 23. Debt for 40 *l.* the Executor pleaded *plene administravit*. The Plaintiff reply'd Assets, and it was found for him to the Value of 20 *l.* and Damages to 5 *l.* the Judgment shall be for the 20 *l. de Bonis Testatoris*, and for the 5 *l. de Bonis Propriis*, and a *Casa* for the Damages.

24 Ed. 3. 25, 26, 47, 48. But other Books say, That the Judgment shall be for the whole Debt, because of the false Plea; and with this the latter Authorities agree.

Now as to the *Sci' Fac'*, there is a great deal of Difference where the Jury find *less than the Debt* for which the Plaintiff declar'd, and where they find that the Executor *fully administer'd*. For in

4 H. 6. 4. the first Case the Judgment is to recover the whole Debt, and the Plaintiff may have a *Sci' Fac'* when more Assets come to the Hands of the Executor; but where 'tis found that he *fully administer'd*, though the Plaintiff afterwards suggests that he had more Assets, yet a *Sci' Fac'* will not lie, because by that Verdict the Record was determin'd. And 'tis a Question, Whether a new Action of Debt may be brought against the Executor, for the Plaintiff was once barred from such Action.

And that Judgment shall be for the *whole Debt*, where *less* is found than for what the Plaintiff declar'd. My Lord *Brook*, in abridging the aforesaid Case in the Year-Book 46 *Ed.* 3. tells us,

us, the Law was so clear *quod nullus dedixit*, and so one of the Prothonotaries told the Court *Anno* 33 *H.* 6. and that if the Executor should afterwards happen to have more Goods in his Hands, the Plaintiff shall have a *Sci' Fac'* to have Execution of those Goods *quod fuit concessum per omnes Justitiarios*, as the Book tells us. Of the same Opinion was Sir *John Fortescue*, Chief Justice of the *King's Bench* in the next Year, *viz.* that if *Part* be found by the Verdict, the Plaintiff shall have Judgment, and a *Sci' Fac'* for the Residue when more Assets come to the Hands of the Defendant. And *Anno* 7 *Ed.* 4. the Chief Justice *Danby* and Justice *Choke* held it to be so clear, that they would not suffer it to be argu'd. And yet my Lord *Anderson* in *Mich'as* 29 *Eliz.* was of another Opinion, that such a Judgment did not warrant a *Sci' Fac'*, but if more of the Testator's Goods came to the Defendant's Hands, the Plaintiff ought to bring a new Action of Debt against him.

34 H. 6. 24.

7 Ed. 4. 9.

Moor 246.

But the Law was settled as to this Point in *Mary Shipley's* Case, where *less* was found by the Verdict, and the Plaintiff had Judgment to recover the *whole* Debt, and Damages and Costs *de Bonis Testatoris*, and ‖ if that could not be had, then Damages *de Bonis Propriis*, because by pleading *plene administravit* he had confess'd the Debt, and the Plaintiff might have *Judgment for the whole* immediately, though he could not have *Execution for the whole* till Assets happen'd.

Mary Shipley's Case, 8 Rep. 134.

‖ Chapman *versus* Gale, 2 Lev. 22.

'Tis true, *Anno* 10 *Car.* the Court deny'd it to be Law, as it was cited in *Mary Shipley's* Case, *viz.* That the Plaintiff might pray Judgment *cum Assets acciderint*, for he must either confess or deny the Plea of *plene administravit*. If he confesses it he is barr'd, and must pay Costs to the Defendant, and so he must if he deny it, and

Dorchester *versus* Webb. Gro. Car. 372.

Rastall Ent. 324.

'tis found against him; but if it should be found that the Defendant had some Assets not administer'd, then his Plea is false; for he hath not fully administer'd, and then the *Judgment* shall be for the *whole Debt*, and Execution for as much as is found, and shall not be barred of the Residue, but shall have a *Sci' Fac'* to have Execution of it *quando Assets acciderint.*

And this I think agrees with *Mary Shipley's* Case, neither can I find it reported in that Case, that the Law is, That the Plaintiff might pray Judgment *cum Assets acciderint*, but quite contrary, *viz.* that he shall have *Judgment* for the *whole* where *less* is found, than for which the Plaintiff declar'd, and shall have *Execution* for so much as found immediately, and for the Residue *cum Assets acciderint.*

Gawdy *versus* Longham, Allen 37. S. P.

The Difference is, where upon *plene administravit* pleaded, the *Plaintiff replies Assets*, and where he confesses the Plea to be true; for if he reply *Assets*, and some are found, though but to a small Value, he shall have Judgment for the *whole Debt*, and Execution for such as is found, and for the Residue when more Assets comes to the Hands of the Executor, and so is *Mary Shipley's* Case: But when he confesses the Plea to be true, then it hath been doubted whether he shall have Judgment to recover *cum Assets acciderint*, and that is *Dorchester* and *Webb's* Case ante 204.

Noell *versus* Nelson, 2 Sand. 226. 1 Sid. 448. 1 Lev. 286. 1 Vent. 94.

But since it hath been adjudg'd, where the Plaintiff confesses the Plea to be true, he may pray Judgment *de Bonis Testatoris quæ in futuro ad Manus defendentis devenerint*; and upon suggesting Assets afterwards, may have a *Sci' Fac'*, and obtain Judgment thereon, and such a Judgment on a *Sci' Fac'*, was affirm'd in the *Exchequer-Chamber* upon a Writ of Error.

Debt

Debt against an Administrator, who pleaded *plene administravit*, the Plaintiff reply'd Assets, then the Defendant *relicta verificatione cognovit actionem nec quin ipse detinet* the Debt; and thereupon Judgment was given, that the Plaintiff should recover *de Bonis Testatoris* and it was mov'd that this was a Confession that he had Goods *sufficient* to satisfy the Debts of the Intestate, and it was pray'd that it might be added to the Entry; but it was deny'd by the Court, because the Confession can extend no farther than to the Acknowledgment of the Debt in the Declaration, and not to the Assets. Bird *versus* Culmer, Hob. 178.

The Testator left a personal Estate to the Value of 2000 *l.* he owed 500 *l.* upon Specialties, and 500 *l.* more upon Simple-Contract, and dispos'd 400 *l.* in Legacies, and made *Jennings* Executor *durante minore ætate* of his Son, who paid 1400 *l.* in discharge of the said Debts and Legacies, and accompted with the Infant when he came of Age, and upon Payment of 91 *l.* to him had a Release; then an Action was brought against *Jennings*, who pleaded *plene administravit*, and the Jury found, that he paid the Debt and Legacy as aforesaid, and deliver'd over *totum residuum status Personalis* of the Testator to the Executor when he came of Age. Now though it was objected, that this Verdict did not maintain the Plea of *plene administravit*, because that cannot be pleaded but where all the Debts are paid as far as the Assets will reach, yet it was adjudg'd a good Plea; for in whatsoever Manner an Executor discharges himself of the Testator's Estate, he may plead that Plea, and 'tis safest for him so to do. Brooking *versus* Jennings, 1 Mod. 174

Lastly, If an *Executor* of an Executor is sued, he cannot plead *that his Testator, in vita sua plene administravit omnia Bona & Catalla quæ fuerunt primi Testatoris*; but he ought to plead, that after Williams *versus* Kinsham, Dyer 174.

the Death of both the *Testators*, he administer'd *omnia Bona quæ fuerunt primi Testatoris*, and conclude *& sic nihil habuit in Manibus suis* of his Testator.

Possibility.

See Debet & Detiner, 194.

See Term for Years.

THIS (in the Sense of the Law) is a Thing which may or may not be, and 'tis either near and common, or remote and extraordinary; as for Instance, one Man dies before another, this is a *near and common Possibility*; but that a Man shall marry a Woman, and she shall die, and he shall be marry'd to another, this is a *remote Possibility*.

Under this Title I shall mention;

(1.) *Where a Possibility may be devised*; *where not*.

(2.) *Where the Person dies before the Possibility happens, his Executor shall have it*; *where not*.

(3.) *Where a Possibility may be barred by a Fine*.

Cole versus Moor, Moor 806.

(1.) *A Possibility founded on a Trust* may be devised; as where the Testator devised a Term for Years to *James Moor* for Life, and if he die before it expire, the Remainder to *Philip Cole*, and made *James Moor* his Executor, who enter'd; afterwards *Philip Cole* (being entitled only to a Possibility to have the Term) devised all his Interest to *Richard Cole*, the said *James Moor* being then living, who afterwards granted the Term to some Friend in Trust for himself. *Richard Cole* prefers a Bill in Equity against him, for endeavouring to defraud him of this Possibility; now though a Possibility cannot be granted or devised by the Rules of Law, yet this Possibility being

being founded on a Truſt in *James Moor* to preſerve the Leaſe, ſo that it might go according to the Will of the Teſtator *Philip Cole*, who is the *Ceſtui que Truſt*, may declare his Will thereof, as *Ceſtui que Uſe* might of Land before the Statute 1 *R.* 3.

Deviſe to his Wife for Life, Remainder of one Part to his eldeſt Son in Fee, and of the other Part to his youngeſt Son in Fee; Proviſo, that his Wife ſhall pay his Debts and Legacies; and if ſhe die before Payment, then his two Sons ſhall pay them; and that if either of his Sons died before Payment, *&c.* then the Survivor and his Heirs ſhall have the whole. The eldeſt Son, in the Life-time of his Mother, releaſed to the youngeſt Son all the Right, Title, Claim, Reverſion, and Remainder deviſed to him by his Father. It was inſiſted, that this Releaſe could not extinguiſh his Right, becauſe he had only a remote Poſſibility to have the Eſtate; for his Mother muſt be dead, and the Debts muſt be paid, before he can have it; 'tis probable the Mother may pay the Debts, but if ſhe doth, the Son cannot have the Lands whilſt ſhe lives; but adjudg'd, That this Releaſe did extinguiſh his Right, becauſe this Poſſibility was not very remote; but the Condition being annexed to his Eſtate, was extinguiſh'd by this ſpecial Releaſe. Winch. 54 Hoe's *Caſe*.

But a *meer Poſſibility* is not deviſeable either by the Common Law, or by any Rules in Equity; as for Inſtance:

A Deviſe of Lands to Serjeant *Fountain* and his Heirs, upon Truſt to pay 300 *l. per Ann.* to his Daughter *Mary* for Life, and if ſhe have Children, then to them ſucceſſively, *&c.* and for Want of ſuch Iſſue, to the eldeſt Son of his Nephew *John Cater*, whoſe Name was *Anthony*, Biſhop *verſus* Fountain, & al', 3 Lev. 427.

who had two Sisters marry'd to *Bradshaw* and *Todd*. *Anthony* had Issue *John*, and dy'd; *John* in the Life-time of *Mary* devised the Lands to the Plaintiff *Bishop*, and dy'd without Issue; the *Heir of* Serjeant *Fountain* convey'd the Lands to *Bradshaw* and *Todd* the Sisters of *Anthony*; and thereupon *Bishop* brought his Bill in Equity to have the Lands convey'd to him, suggesting that the Equity to have this Estate, was vested in *Anthony*, and so well devised to him by *John*, who was the Son and Heir of *Anthony*: But it was decreed, That *John* had only a meer *Possibility during the Life of* Mary, and any of her Issue, and by Consequence his Devise to *Bishop* was void.

Goldf. 64.

(2.) And this is the Reason why it shall not go to the Executors, as a Devise to his Wife for *Life*; and *if she live till his Son is* 24 *Years of Age*, then to him; and if she die before that Time, then to *R. B.* until his Son is of that Age. *R. B.* dy'd before the Wife, then she dy'd before the Son was 24; adjudg'd, That the Executor of *R. B.* shall not have it in the mean Time, because nothing was vested in his Testator, but only a meer * Possibility of an Interest.

* Price *versus* Almory, 1 Bulst. 191. Moor 831. 4 Leon. 246

The Testator being possess'd of a Term for 2000 Years, devised it to his Wife for Life, Remainder to *W. R.* in Tail, and made his Wife sole Executrix, and dy'd; he in Remainder granted the Lands to *R. B* for the Term of 1500 Years. The Widow Executrix marry'd the Defendant, and assented to the Legacy. The Question was, Whether the Remainder Man could dispose this Estate during the Life of the Executrix, who was Tenant for Life; and adjudg'd, That he could not, because it was but a Possibility, and no more.

Cook *versus* Bellamy, 1 Sid. 188. *See* Price *versus* Almory, S. P.

But

But a Poſſibility is deviſeable by Way of Executory Deviſe, which ſee under that Title.

(3.) *And there is a Caſe where it may be barred by a Fine*; ſſ. One *Grant* being ſeis'd in Fee, deviſed the Land to his Wife for *Life*, and when *John Grant* ſhall be 25 Years of Age, then he to have it in Fee; *John*, after 21, and before 25, levy'd a Fine to *R. B.* and liv'd till after 25, and then dy'd; adjudg'd, That his Heir was barred by this Fine, though at the Time it was levy'd he had only a Poſſibility to have the Eſtate in Fee; this is cited in *Lampet's* Caſe, but with very little Difference, Johnſon *verſus* Gabriel, Cro. Eliz. 122. 3 Leon. 227. 10 Rep. 50. *a.*

The Teſtator poſſeſs'd of a Term for Years, deviſed the Profits thereof to one for Life, Remainder to another; the Tenant for Life enters with the Aſſent of the Executor, and he in Remainder, during the Life of the Tenant for Life, aſſign'd his Intereſt to another; then the Tenant for Life dy'd; it was adjudg'd, That the Aſſignment was void, for he in Remainder had only a Poſſibility during the Life of the Tenant for Life, who had an Intereſt in the whole Term *ſub modo*, for he might have outlived it. *Cited in* Fulwood's *Caſe*, 4 Rep. 66 *b.*

Preſentation by Executor.

IF a Biſhop hath a Title to preſent upon a Vacancy, who dies, and the Temporalities come to the King, he ſhall preſent, and not the Executors of the Biſhop. 50 Ed. 3. 26.

If the Church become void in the Life-time of the Biſhop, he cannot deviſe the next Preſentation. Dyer 283.

But if he or the Incumbent of a Church hath the Advowſon in Fee, and either of them deviſe that upon the Avoidance his Executor ſhall pre-

ſent, this is good, though they deviſe the Inheritance to another.

So if I grant the next Preſentation of the Church of *H.* unto *R. B.* who dies, and then the Church becomes void, his Executor ſhall have it as a Chattel, and not his Heir.

Probate.

THIS is only an Allowance or Confirmation of what the Teſtator hath made or done, 'tis a Solemnity requir'd to the Perfection and abſolute Confirmation of his Will; and 'tis uſually made in the *Eccleſiaſtical Court*, and thereupon Letters Teſtamentary are granted under the Seal of that Court, by which the Executor is enabled to maintain an Action; but it was not always ſo.

For the Probate of Wills did *originally* belong to the *Temporal Courts*, and the Legatees might have a proper Remedy in thoſe Courts to recover their Legacies; for we find there is a Writ which lies at Common Law to demand a Legacy.

Glanvill Lib. 6. cap. 6, 7.

It was but of late as we are told *Anno* 2 *R.* 3. that Wills were prov'd in the *Spiritual Courts*; in all other Nations they are prov'd in the *Temporal Courts*, and in many Places in *England* even at this Day the Lords of Mannors have the Probate of Wills. And *Tremayle*, who was that King's Serjeant, told the Court, That he was Steward of ſeveral Mannors in his County, where both Freehold and Copyhold Tenants prov'd their Wills before him in the Courts-Baron.

Fitz Teſtament 4.

Linwood, who was Dean of the Arches, and who wrote about the Beginning of the Reign of *H.* 6. doth confeſs, that the Probate of Wills did belong

belong to the Ordinaries *non de Communi Jure*, but by Cuſtom. And Archbiſhop *Parker* publiſh'd a Book *Anno* 1573, in which he tells us, That *Rex Angliæ olim erat Conciliorum Eccleſiaſticorum Præſes, &c. propugnator Religionis, nec illum habebant Epiſcopi Authoritatem præter eam quam a Rege acceptam referebant, Teſtamenta probandi Authoritatem non habebant, nec adminiſtrationis poteſtatem cuique delegare non potuerunt.* 11 H. 7. 12. Henloe's Caſe, 9 Rep. 38.

But now the *Spiritual Courts* have generally obtain'd the Juriſdiction of Probate of Wills, which may be made in *common Form*, or *per Teſtes*; the one is by the Oath of the Executor, or of the Party who exhibited the Will, who ſwears upon his Credulity, that 'tis the laſt Will of the Deceas'd. The other is *per Teſtes*, and that is, where beſides the Oath of the Executor, he produces Witneſſes to atteſt it to be the laſt Will of the Deceas'd, and this in the Preſence of the Parties who have any Intereſt, and in their Abſence if ſummon'd and not appearing; and this Proof in *common Form*, may be controverted at any Time, but the Proof *per Teſtes* cannot after 30 Years.

It may be prov'd before a *Commiſſary*, or before an *Archdeacon*, or a *Sequeſtrator*; but where a *Guardianſhip of a Child* is deviſed by Will, it ſhall not be prov'd in the *Spiritual Court*, becauſe it being a Power given by the *Statute*, it properly belongs to the Courts at *Weſtminſter* to determine, whether the Deviſe was made purſuant to the Statute; and therefore like Wills by which Lands are deviſed, it is uſually prov'd by Witneſſes in *Chancery*. 7 Ed. 4. 14. 1 Vent. 207

Under

Under this Title I ſhall mention,

(A.) *What an Executor may do or not do before Probate.*

(B.) *To whom Adminiſtration ſhall be granted, where an Executor dies before Probate.*

(C.) *What the Law is as to the Probate, where Lands and Goods are deviſed in the ſame Will.*

(D.) *Where a Probate once granted may be ſuſpended or revoked.*

(E.) *Whether a Probate under Seal of the Court is traverſable or not.*

(F.) *Concerning Fees for Probate of Wills.*

1 Roll. Abr. 917. (A.) If an Action is brought by an Executor *before Probate*, and the Will is prov'd before he declares, 'tis well enough, becauſe the Plaintiff is Executor before Probate, and his proving the Will afterwards removes the Impediment *ab initio*.

Duncomb *verſus* Walter, 2 Vent. 370 Raim. 479. 3 Lev. 57. S. C. An Executor may bring an Action before Probate; and if he ſhews the Probate in his Declaration by a *profert hic in Curia Literas Teſtamentarias*, 'tis well enough; ſo if he hath the Reverſion of a Term for Years, on which a Rent is reſerv'd, he may diſtrein and avow for the Rent before Probate.

Parton *verſus* Baſeden, 1 Mod. 215 Judgment againſt the Teſtator, and upon a *Devaſtavit* return'd againſt his Executor, he pleaded and a ſpecial Verdict was found to this Effect. The Defendant *was made Executor*, and dwelt in the ſame Houſe with the Teſtator; that before Probate he poſſeſs'd himſelf of the Goods, and had them appraiſed, and put into an Inventory, and then ſold Part, and paid a Debt owing by the Teſtator, and converted the reſt to his own Uſe;

Uſe; that afterwards he refus'd before the Ordinary to prove the Will; that Adminiſtration was granted to the Widow of the Teſtator. The Queſtion was, Whether this Executor ſhould be charg'd with the whole, or only for ſo much as he converted? Becauſe all being done before Probate, it was done by him as *Executor de ſon Tort*; but adjudg'd, he ſhall be charg'd for the whole, becauſe he was *made Executor*, and in ſuch Caſe he is compleat Executor before Probate; and the granting Adminiſtration to the Widow is void, becauſe the Defendant was rightful Executor, and had adminiſter'd Part of the Goods, and had Poſſeſſion of the whole, and therefore ſhall not be diſcharg'd by delivering over Part to another who was not a rightful Adminiſtratrix.

Libel in the Spiritual Court to prove a Will; the Defendant ſuggeſted for a Prohibition, that in the Will there were *Lands* and Legacies deviſed, and that the *Teſtator was non compos mentis*; but the Prohibition was deny'd, becauſe the Statute of *H.* 8. never intended to diminiſh the Juriſdiction of the Spiritual Court as to Probates; and it might be very inconvenient to ſtay the Probate in this Caſe, becauſe whilſt 'tis ſtay'd, the Executor cannot ſue for Debts, and by that Means they may be loſt, and the Will not perform'd; and it would be to no Purpoſe to grant a Prohibition to the Probate *quoad* the *Lands*, becauſe as to them the Probate is *coram non judice*, and cannot be given in Evidence in any Court at Law. In this Caſe the Marqueſs of *Winton*'s was deny'd to be Law. Partridge's *Caſe*, 2 Salk 553.

He is Executor before Probate to pay Debts, and to be ſu'd for Non-payment; but not to have an Action, unleſs as in the Caſe before-mention'd. Wolfe *verſus* Heydon, Hutt. 30.

The

Smithley *verſus* Cholmeley, Dyer 135.

The next Avoidance was granted to the Teſtator, who made his Executor, and dy'd; and the Executor before Probate, granted the next Avoidance to the Plaintiff in a *Quare Impedit*, who ſet forth, That the Church was void, and averr'd that to be the next Avoidance, and did ſhew forth the Will; adjudg'd, That he need not, for the Grant was good, tho' he never prov'd the Will.

He may poſſeſs himſelf of the Teſtator's Goods; he may *receive* or *pay Debts* due and owing by his Teſtator, and may *diſcharge* any Legacies; he may likewiſe *releaſe* any Debt due to the Teſtator, becauſe the *Right of Action is in him before Probate*, and this Right he hath by the Will, for the Probate gives him no Intereſt.

Ruſſell's *Caſe*, 5 Rep. 27. 2 Inſt. 292.

He may bring an Action of *Treſpaſs* for the Goods of the Teſtator taken unjuſtly *from himſelf*, or he may *replevy* ſuch Goods if impounded, becauſe theſe are Actions which ariſe out of his *own Poſſeſſion*; and this may be ſeen in the Inſtances following:

2 And. 151. Geriſbrook *verſus* Fox, Plow. Com. 277.

Anno 42 *Eliz.* it was held, That an Executor, before Probate, may poſſeſs himſelf of the Teſtator's Goods; and if Adminiſtration ſhould be granted to another, and ſuch Adminiſtrator ſhould take the Goods from the Executor before Probate, he may then prove the Will, and bring an Action of *Treſpaſs* againſt the Adminiſtrator, becauſe the Poſſeſſion of the Teſtator's Goods belongs to the Executor, and the Adminiſtration is void as ſoon as the Will is prov'd.

Middleton's *Caſe*, 5 Rep. 28. 5 Roll. Abr. 917 *Dyer 367

So if he *releaſe* a Debt before Probate, and afterwards proves the Will, the Releaſe is good.

(B.) *If a Term for Years is deviſed to one who is alſo made* * *Executor, and enters and dies before Probate,*

bate, his Executor ſhall have the Term, becauſe the Will was executed by the Entry.

And if he is made *Reſiduary Legatee* as well as Executor, and *dies* before Probate, Adminiſtration ſhall be granted to his Executor, or his Adminiſtrator ſhall have a Title to the Goods; but if he was not *Reſiduary Legatee*, then Adminiſtration muſt be granted to the next of Kin of the firſt Teſtator; and ſo is *Harris's* Caſe, where the Huſband made his Wife Executrix, and died, and then ſhe dy'd Inteſtate before Probate, Adminiſtration was granted to the next of Kin of the Huſband.

Iſted verſus Stanley, Dyer 372.

Harris's Caſe, 2 Mod. 101.

But there is a Caſe in *Hetley*, where the Huſband made his Wife Executrix and *Reſiduary Legatee*, and ſhe dy'd before Probate; and it was adjudg'd, That the Adminiſtrator of the Huſband ſhould have the Reſiduary Part, becauſe the Wife neglected to prove the Will, by which ſhe might have been entitled to the Goods.

Den verſus Burrough, Hetley 105

If an Executor *dies* before Probate, then his Teſtator is dead without an Executor; for an Executor of an Executor cannot be Executor to the firſt Teſtator, unleſs the firſt Executor had proved the Will, becauſe the Spiritual Court cannot take Notice who is Executor but by the Probate.

(C.) *Where a Will is made of Lands and Goods, the Temporal Courts will not probibit it to be prov'd in the Spiritual Court*; 'tis true, this was againſt the Opinion of Juſtice *Croke*, becauſe the *Land being the Principal*, the Spiritual Courts had no Authority in ſuch Caſes, and that it would be inconvenient if they ſhould; for the Sentence given in that Court, might have ſome Influence upon any Suit which might happen in the Temporal Courts concerning the Land.

Nettor verſus Brett, W. Jones 355. Cro. Car. 391, 393.

But

But before that Caſe it was adjudg'd, That it ought to be prov'd in the Spiritual-Court.

Semane's *Caſe*, 1 Bulſt. 199. Egerton *verſus* Egerton, 2 Bulſt. 219 2 Cro. 346. Weſtby *verſus* Allen, Cro. Car. 94. Hill *verſus* Thornton, Cro. Car. 118.

‖ Libel, ſetting forth, that *W. R.* made a Will, and the Complainant Executor, and deviſed his Lands to his Executor to ſell; and that he ſu'd in the Spiritual-Court to have a Probate thereof; the Defendant ſuggeſted for a Prohibition about this Matter, *ubi revera* he made no Will; upon which they were at Iſſue, and the Plaintiff in the Prohibition was Nonſuit; but it was inſiſted, that the Defendant ought not to have a Conſultation, becauſe he did not ſet forth in his Libel, that the Teſtator *had Goods*, and then there is no Occaſion for a Probate in that Court; for a Will of Lands ought not to be proved there: But adjudg'd, That he muſt prove the Will, otherwiſe he can have no Action for the Goods, if there are any.

Afterwards it was held, That a ſpecial Prohibition ſhall go to the Spiritual-Court, *quoad the Lands*. And ſo my Lord *Hales* tells us, it was done in *Minſhull* and *Spicer*'s Caſe.

Minſhull *verſus* Spicer, Hardreſs 131. Cro. Car. 81. *Dennis's Caſe.*

But of late Days ſuch Prohibitions have been denied, becauſe the * Party can be at no Prejudice by the Probate in the Spiritual-Court, in reſpect to the *Land*; for 'tis no Evidence againſt him at Law; but it would be very injurious to Executors, that Prohibitions ſhould be granted in ſuch Caſes, becauſe they being hinder'd from proving the Will, cannot ſue for a juſt Debt, and by that Means Part of the Teſtator's Eſtate may be loſt.

* Hobert *verſus* Barrow, Hardreſs 313.

(D.) *The Probate of a Will may be ſuſpended by an Appeal; but 'tis a Queſtion, Whether it may be revok'd by the Ordinary after 'tis granted; as for Inſtance,*

1 Roll. Rep. 226.

The Teſtator made *Adiell Mills* Executor, and gave the *Reſidue* of his Eſtate to *Gillam Hills*, and other Children, and died. *Mills* the Executor prov'd

Hills *verſus* Mills, 1 Shore 293 1 Salk. 36.

prov'd the Will, and became a Bankrupt. Then *Hills*, one of the *Reſiduary Legatees*, cites the Executor to ſhew Cauſe why the Probate granted to him, ſhould not be revok'd, and Adminiſtration, with the Will annex'd, granted to *Gillam*; and it was inſiſted for him, that *Mills* being only a bare Executor, and having no Intereſt, and having made himſelf incapable to manage his own Eſtate, either for want of Honeſty or Conduct, was therefore incapable of being an Executor, and the Probate for that Reaſon ought to be *revok'd*; that the Teſtator made him Executor, upon a Suppoſition of his Ability; and if his Circumſtances alter, the Ordinary is oblig'd to do what the Party himſelf would have done, if he had been living; and for thoſe Reaſons the Probate was revok'd, and Adminiſtration, with the Will annex'd, granted to *Gillam*.

But upon a Motion of a Prohibition it was inſiſted, That the Probate was not *revocable*, becauſe it was to alter the very Will itſelf; and that it was a making a new one for him, that the *Mens Teſtandi* was as ſtrong for making *Mills Executor*; as for making *Gillam Reſiduary Legatee*, that the *Bankrupcy* is no Diſability, or Breach of Truſt, *quoad the Executorſhip*; for the Law protects what he hath as Executor, from all Forfeitures which may incur by his Acts or Omiſſions; that the Teſtator himſelf judg'd him more fit to manage his Eſtate than his own Sons, and that the granting the Probate was only to capacitate him to ſue, for he might releaſe or pay Debts before Probate; and if *Gillam* ſhould bring an Action, the Defendant may plead an Executor made, and ſtill living; 'tis true, where *Adminiſtrations* are granted, they may be afterwards *repeal'd* by Reaſon of the Adminiſtrator's becoming *Bankrupt*: But there is a Difference between the Caſes; for an Adminiſtrator is made by the Court,

Quere ſince the Statute of Diſtribution, &c.

Court, but an Executor is conſtituted by the Party himſelf, and the Law entitles him to the Probate of the Will, and for thoſe Reaſons a Prohibition was granted.

The King verſus Sir R. Rayner, 1 Salk. 299

Mandamus to the Judge of the Prerogative Court, to grant a Probate of a Will; he return'd, that the Executor was a Perſon who abſconded, and incapable, *&c.* This was adjudg'd an ill Return; for ſince the Teſtator had thought him a proper Perſon, the Ordinary ſhall not adjudge him otherwiſe, upon any Diſability ariſing by the Canon-Law; neither can the Ordinary make him give Security, becauſe the Teſtator thought him ſufficient, and he hath a temporal Right, for which he cannot ſue before Probate.

North verſus Wells, 1 Lev. 235. Raim. 405.

(E.) *A Probate of a Will was given in Evidence to prove an Executrix, and the Defendant ſaid, that the Will was forg'd*; but he was not admitted to give any Proof of it, becauſe it was againſt the Seal of the Ordinary, in a Matter proper for his Juriſdiction; but Evidence might be given that the Seal was forg'd, or that there were *Bona Notabilia*, or the Party might be reliev'd on an Appeal.

21 H. 8. cap. 5.

(F.) *The Fees for Probate of Wills, and granting Adminiſtration, are made certain by the Statute* 21 H. 8. *by which 'tis enacted*, That *Six-pence only ſhall be taken by the Regiſter, where the Goods of the Deceaſed exceed not* 5 l. but then the Tranſcript of the Will muſt be brought to him ready engroſs'd with Wax, to be ſeal'd.

When the Goods are *above the Value of* 5 l. *and under* 40 l. the Fee to the Judge is 2 *s.* 6 *d.* and to the Regiſter 1 *s.*

When they *exceed the Value of* 40 l. the Judges Fee is 2 *s.* 6 *d.* and to the Regiſter 2 *s.* 6 *d.* which he may refuſe, and take a *Penny* for ten Lines of the Will, each Line being ten Inches in Length.

So

So for *Administrations*, when the Intestate's Goods *exceed* 5 l. *and are under* 40 l. the Officer's Fees are only 2 *s.* 6 *d.* and he who takes more than his due Fee, forfeits what he takes more to the Party grieved, and 10 *l.* besides, to be divided between the King and him.

Anno 6 Jac. An Information was brought upon this Statute against a *Commissary of the Archdeacon* for Extortion, in taking a Fee of an Executor, who brought the Transcript of the Will ready engross'd, and he only put the Probate to it; and adjudg'd, That no Fee was due to him for such Transcript; 'tis true, he may annex the Probate to such Transcript, and so he may to the Will it self; for which he is to have no other Fee than what is allow'd by the Statute. Neal *versus* Rowse, 4 Inst. 336. Coke Ent. 166.

By a Statute made in the Reign of King *James*, a popish Recusant Convict is disabled to prove; and therefore when such a Recusant made his Wife Executrix, who was likewise a Recusant Convict, a Prohibition was granted to the Spiritual-Court to hinder the Probate. 3 Jac. cap. 5. Ride *versus* Ride, Mod. *Cases*, 239.

By a late Statute it is enacted, That the *Power of granting Probates, and Administrations of the Goods of Persons dying, for Wages or Work done in her Majesty's Docks and Yards, shall be in the Ordinary of the Diocese where the Party dieth, or in him to whom such Power is granted by the Ordinary, and that the Salary and Wages for Pay due to such Person from the Queen, &c. for Work done in any Docks or Yards, shall not be deem'd* Bona Notabilia, *to entitle the Prerogative Court to any Jurisdiction in such Case.* 4 & 5 Annæ. cap. 16.

Profits, Deviſe thereof.

See *Tit. Dying*, &c. 225. See *Executors Right*, &c. 275. See *Executory Deviſe* 289. See *Iſſues and Profits* 261. See *Authority* 108.

IN many Wills the *Profits of Lands* are deviſed, it may therefore be neceſſary to mention what the Law is in ſuch Caſes; and 'tis generally held, That by thoſe Words an *Intereſt* is veſted in the Legatee, and that ſuch a Deviſe paſſeth the *Lands*.

Dyer 210. *ſſ.* The Teſtator deviſed, That his Executors ſhould have the *Iſſues and Profits* of his Lands untill his Son came of Age, that with the *Profits* they might pay his Debts and Legacies, and educate his Children. One of the Executors died, the Survivor made his Executor, and died; adjudg'd, That ſuch Executor of the Survivor may meddle with the Profits during the Nonage of the Son, becauſe his Executor had an *Intereſt* by the Deviſe of the *Iſſues and Profits*, and not an *Authority* only.

2 Leon. 221. Moor 635. S. P. 3 Leon 78. 216. So a Deviſe of the *Profits*, &c. to his Wife untill his Son came of Age, is a Deviſe of the *Land* itſelf 'till that Time; but if it had been a Deviſe of the Land to the Son, and that ſhe ſhould *take* the Profits thereof 'till he came of Age, this is only an *Authority* which is determin'd by her Death.

Owen 7. A Deviſe of the *Profits* and Occupation, &c. to his Wife, during her Widowhood, is a good Deviſe of the *Land* itſelf during that Time.

Gates *verſus* Hollywell, 3 Leon. 216. A Deviſe of the *Profits*, &c. to his eldeſt Son, 'till his youngeſt Son ſhould come of Age, and then to the youngeſt in Tail; this is a Deviſe in Fee to the eldeſt in the mean Time.

The

The Teſtator was poſſeſs'd of a Rectory for a Term of Years, and devis'd the *Profits* to his Wife for ſo many Years as ſhe ſhould live, and after her Deceaſe he deviſed the Profits to twenty of his pooreſt Kindred, and that the Rectory ſhould then be leas'd out for as much Rent as could be got for the ſame by the *Adviſe of his Overſeers*, and diſtributed to twenty of the pooreſt of his Kindred; adjudg'd, That a Deviſe of the *Profits* is always a Deviſe of the *Lands itſelf*, if there are no other Words to ſhew the Intent of the Teſtator; but in this Caſe the twenty poor Kindred had no Property in the Term by the Word *Profits*, for they had not Power to make the Leaſe, it was to be done by the Advice of the Overſeers, and therefore the Property was in them, and a Confidence only in the poor People. Griffith *verſus* Smith, Moor 753. Moor 758.

Deviſe to *Francis*, his eldeſt Son in Tail, Remainder in like Manner to his ſecond Son, provided if *Francis* die without Iſſue-Male, and leaving Iſſue-Female, then ſhe to *take the Profits* until the Remainder-Man pay her 400 *l.* *Francis* had Iſſue only a Daughter *Elizabeth*, who enter'd and *died* before her 400 *l.* was paid: It was adjudg'd, That an Intereſt was veſted in her; for an Authority to *take the Profits*, implies as much as a Deviſe of the Profits, and 'tis ſuch a Chattel which ſhall go to her Adminiſtrator: Now though the Profits of the Land are only a Pledge for the Payment of the Portion, yet they follow the Portion. Price *verſus* Vaughan, Allen 45.

A Fine was levied to the Uſe of the Conuſee for Life, Remainder to *W. R.* and *R. B.* and their Executors, *until they ſhall have levied* 300 l. *for the Performance of his Will.* The Executors permitted the next in Remainder, after the Death of the Conuſor to enter, which he did, and receiv'd more Roſs's *Caſe*, Moor 556.

of the Profits than would ſatisfy 300 *l.* then one of the Executors died, and the Survivor made a Leaſe to *T. P.* the now Plaintiff, who brought an Ejectment. Adjudg'd, That the Leaſe was void, becauſe the Eſtate of the Executors was determin'd by their own Negligence; for they might have receiv'd the 300 *l.* by Perception of the Profits, and would not, but ſuffer'd another to enter; and tho' the Words in the Will are, *until they ſhall have levied* 300 l. it muſt be underſtood, and ſo intended, *until they might conveniently have levied* 300 l.

Strangeways *verſus* Newton, Moor 751.

The Father being ſeis'd in Fee, covenanted to ſtand ſeis'd to the Uſe of himſelf for Life, Remainder to the Uſe of ſuch Perſons as he ſhould appoint by his Will, for any Term not exceeding 31 Years (and this was for Payment of his Debts and Legacies) Remainder to his Son in Tail; afterwards he devis'd 800 *l.* a-piece to his three Daughters, *to be rais'd out of his Lands*, mention'd in the aforeſaid Deed, which Lands were of the yearly Value of 200 *l.* The Queſtion was, Whether a Term, not exceeding 31 Years, was a ſufficient Certainty to raiſe 2400 *l.* for the three Daughters, out of the Profits of 200 *l. per Annum*? If not, then, Whether the Father, being ſeis'd in Fee, and making ſuch a Will, the Deviſe ſhall take Effect by the Statute of Wills, and ſo diſturb the contingent Remainder to the Son? Adjudg'd, That if the *Land itſelf* had been devis'd, it would have diſturb'd the future Uſe; but the Deviſe being only of Portions to be paid out of the Profits of the Lands, 'tis otherwiſe.

Balder *verſus* Blackborn, Hutt. 36. Hob. 285. 1 Brownl. 79. S. C.

Deviſe of Lands to his Daughter and her Heirs, when ſhe comes to the Age of eighteen Years, and that his Wife ſhould *take the Profits* to her Uſe 'till that Time, without any Account to be

be given; this was adjudg'd a good Term for Years in the Wife, and by her Marriage veſted in the Huſband.

Deviſe of Goods to be ſold to raiſe Portions for his Daughters; and if thoſe are not ſufficient, then to be rais'd out of the Rents, Iſſues and Profits of his Lands. It was decreed, that by thoſe Words the Lands were devis'd; otherwiſe, if it had been to raiſe Money out of the *Annual* Profits. Cary *verſus* Appleton, 1 Ch. Rep. 240.

So a Deviſe of Lands to Truſtees upon Truſt, that out of the *Rents and Profits* they pay Debts and Legacies, decreed, that the Truſtees may ſell. Lingon *verſus* Foley, 2. Ch. Rep. 205.

Publication.

THIS is another Solemnity requir'd by the Law to make a Will good; and that is, by publiſhing it in the Preſence of a particular Number of Witneſſes.

Sometimes a *Will*, which hath been made *many Years*, upon ſome Alteration of Circumſtances, may be new publiſh'd with Additions, and that makes it equivalent to a *new Writing*; but it muſt be where the Words in the written Will are apt and proper, and do not diſagree with the Words in the new Publication. And ſo it was adjudg'd in *Stead* and *Beryer's* Caſe ante 221.

The Effects of a new Publication may be ſeen in the Caſes following.

Huſband and Wife Jointenants in Fee, ſuffer'd a Recovery, *Anno* 23 *H.* 8. to the *Uſe* of the Huſband in Fee; and, in the next Year, he devis'd the Lands to his Wife, Remainder over, and ſometime after he died; adjudg'd, That this Deviſe was void, for the Teſtator having only an *Uſe*, could not deviſe the Poſſeſſion 'till the Statute 27 *H.* 8. which did transfer the *Uſe into Poſſeſſion*; Trevilian's *Caſe*, Dyer 143.

neither could he deviſe the *Poſſeſſion* 'till the Statute 32 *H.* 8. by which Men were enabled to deviſe their Lands in Poſſeſſion; both which Statutes were made ſince the Will: But adjudg'd, That tho' this Will was void, for the Reaſons before mention'd, yet if the Teſtator had made a new Publication after the Statute 32 *H.* 8. it had been a good Will.

Beckford *verſus* Parncot, Cro. Eliz. 493. Moor 404. Goldſ. 150 1 Roll. Abr. 618.

ſſ. The Teſtator being ſeis'd in Fee of Lands in *Aldworth* in *Berks*, had Iſſue four Daughters, and devis'd all his Lands in *Aldworth* to his two eldeſt Daughters in Tail, whom he made Executrixes. Afterwards he purchas'd more Lands there; and one *Parſons*, his Couſin, deſir'd that he might have the new-purchas'd Lands; he reply'd, *No, they ſhall go with my other Lands in* Aldworth *to my Executrixes.* Afterwards being ſick, his Will *was read to him*; but he took no Notice of it, only he added a Codicil concerning ſome perſonal Things, and died. It was inſiſted, that the new-purchas'd Lands did not paſs, becauſe not warranted by the Statute; for that enables a Man to deviſe the Lands which he *Hath*, and he had not thoſe Lands *at the Time he made his Will.* But adjudg'd, That his allowing the Will upon reading it, amounts to a *new Publication*, and ſo are the Words which he ſpoke to his *Couſin*: And tho' 'tis generally true, that Things not expreſs'd in the Will, muſt be expreſs'd in the new Publication, in order to ſhew the Intent of the Teſtator; yet here are apt Words in the Will to paſs the Lands in *Aldworth*, and therefore, by the new Publication, the Lands purchas'd afterwards ſhall paſs.

Fuller *ve ſus* Fuller, Cro. Eliz. 423. Moor 353.

In the very next Year this Caſe happen'd: *ſſ.* The Teſtator had Iſſue four Daughters, and devis'd his Lands to *R. B.* his youngeſt Son in Tail, with Remainders ſucceſſively to his other Sons in Tail. *R. B.* died in the Life time of his *Father*, leaving

leaving Iſſue two Sons; and then their Grandfather, the Teſtator, declar'd his Will to be, *That the Sons of* R. B. *ſhall have the Lands devis'd to their Father, as they ſhould if their Father had out-lived him.* Two Judges were of Opinion, That the Son of *R. B.* ſhall take by Purchaſe; for this new Publication (tho' not in Writing) is *quaſi* a new Will. See *Antea* 221. *Tit. Deſcription*

The Teſtator devis'd *all his Lands*, and afterwards purchas'd *more*, and died. Adjudg'd, if he had made a new Publication of his Will, the Lands purchas'd afterwards would have paſs'd by the Words, *All his Lands*, for that ſhews his Intent to paſs *All*; but without a new Publication 'tis otherwiſe, for in ſuch Caſe *All his Lands* might be intended *All* which he had *at the Time of the making the Will.* Brett *verſus* Rigden, Plow. Com. 345.

The Chief Baron *Jefferies* being ſeis'd in Fee of the Mannor of *Marsfield* in *Suſſex*, and of a Reverſion in Fee of Lands called *Groveland*, devis'd the ſame to *Jefferies*, the Defendant; and afterwards, upon his Marriage with *Mary*, the Daughter of one *Goring*, he made a Feoffment of the Premiſſes to the Uſe of himſelf, and of his ſaid Wife, which was not executed by Livery and Seiſin of the Lands called *Groveland.* Then he interlin'd theſe Words in the Will (*Mary my Wife*) having before made *Margery*, his Daughter, *Executrix.* It was adjudg'd, That the Feoffment was a Revocation of the Will: But the Court doubted whether the Interlining was a new Publication. Serjeant *Rolls* tells us it was not; becauſe what was interlin'd had no Reference to the Lands, neither did it ſhew his Intent that it ſhould be a Will as to the Lands. *See* Stead *verſus* Beryer 221. Montague *verſus* Jefferies, Moor 429. Poph. 108. 1 Roll. Abr. 618.

Purchaſe of other Lands after a Will made.

THIS comes properly under the Title *Publication*, and hath ſome Reference to it. It hath been held in ſome of the old Books, That if a Man deviſe Lands, of which *he is not ſeiſed*, and afterwards *purchaſe* thoſe Lands, and then die ſeis'd, that this Deviſe is good; but this was before the Statute, and the later Authorities are otherwiſe.

39 H. 6. 18. Fitz. Deviſe 17.

For where the Teſtator devis'd Lands, to which he had *no Title*, and afterwards purchas'd thoſe Lands; this is not a good Deviſe within the Statute of Wills, 32 *H.* 8. by which 'tis enacted, That *all Perſons Having* a ſole Eſtate, *&c.* And my Lord *Coke*, who reports this Caſe, tells us, That the Word *Having* imports not only an Ownerſhip, but the very *Time* of ſuch Ownerſhip, and that he muſt *have* the Land at the Time of the *Making*, that is, at the Time of the *Publication* of the Will.

Butler *verſus* Baker, Moor 254. 3 Rep. 25. 1 And. 348 Poph. 87.

In the ſame Year *R. B.* ſold Lands to *Thornton*, who, before any Conveyance made, ſold the ſame Lands to *Thompſon*, who paid Part of the Purchaſe-Money to *R. B.* and Part to *Thornton*, and had a Conveyance made to him by *R. B.* alone, and then he devis'd all the Lands which he had *purchas'd of* Thornton. Now though in Strictneſs this was not the Purchaſe of *Thornton*, for he had no Conveyance from him; yet having agreed for the Purchaſe, and paid Part of his Money, this, according to common Acceptation, may be call'd a *Purchaſe*, and a *Having* the Land, and ſo they ſhall paſs.

Thompſon *verſus* Thornton, 1 And. 188 2 Leon. 120.

And

And accordingly, many Years afterwards, there being a Treaty for a Purchaſe of Lands, and Articles drawn, the intended Purchaſer deviſ'd *All his Lands* for Payment of Debts, and afterwards the Lands were convey'd to him. It was decreed, That the Deviſe was good, though *he had not* the Lands at the Time of the making the Will, nor made any *new Publication* of the Will after they were convey'd, eſpecially the Deviſe being for Payment of Debts. And the *Chancellor* ſaid, If a Man deviſe *All his Lands for Payment of Debts*, and afterwards purchaſe *more Lands*, he would decree a Sale, though there were no precedent Articles. Prideaux *verſus* Gibbon, 2 Ch. Rep. 144.

The Teſtator deviſ'd to his Wife all ſuch Sums of Money, *Lands*, Tenements and Hereditaments, and Eſtate whatſoever, *of which he ſhould be poſſeſs'd at the Time of his Death*; afterwards he purchas'd Gavelkind Lands, and the Queſtion was, Whether they paſs'd by this Deviſe? Adjudg'd, That a Deviſe of perſonal Things is good, tho' the Teſtator had them not at the Time of his Will made, becauſe they go to his Executor, and the Legacy doth not paſs by the Will, but by the Aſſent of the Executor, to whom the Will is directory; but that a Chattel Leaſe (as a Term for Years) which is a Chattel Real, if purchas'd afterwards will not paſs, That a Deviſe of Lands is not good, if the Teſtator had nothing in them at the Time of the making his Will, becauſe a Man cannot give what he hath not, and that which is void in the Original, cannot be made good. As if an Infant make a Will, 'tis void, tho' he come of Age before he dies; and ſo of a Feme-Covert, tho' ſhe become afterwards Diſcovert; and yet in thoſe Caſes there was only a perſonal Diſability; but in the principal Bunter *verſus* Coke, 1 Salk. 237. Goldſ. 93. *Had there been a Republication, it was admitted the Gavelkind Lands would have paſſed.*

principal Caſe there was a real Diſability, for the Thing itſelf is wanting.

Earl's Caſe 4 Jac. 2. B. R.

A Man deviſed *all his Lands* which he had or ſhould have at the Time of his Death, but did not ſay for Payment of Debts; and afterwards he purchaſed Lands, and dy'd. Adjudg'd, That theſe new purchaſed Lands ſhall not paſs by this Deviſe.

Brett verſus Rigden, Plow. Com. 342. 1 Rep. 105. *Cited there in Shelley's Caſe.*

The Teſtator ſeis'd of ten Acres deviſed *all his Lands* to *Henry Brett* and his Heirs, and afterwards purchaſed 12 Acres more; then *Henry Brett* dy'd, and the Teſtator ſaid to the Son of *Henry*, *That he ſhould be his Heir, and have all his Land* as his Father ſhould, if he had liv'd. Adjudg'd, That the *Son* ſhould not have the *new purchaſed* Lands, for it did not paſs by the Words or Intent of the Teſtator: Not by the Words, for when he had ten Acres, and deviſed *All* his Lands, thoſe Words were ſatisfy'd in paſſing the ten Acres, and there are no Words which ſhew his Intention that the Lands afterwards purchaſed ſhall paſs. He could have no ſuch Intent when he made his Will, becauſe he had not the Lands at that Time; and what was not his Intent at the Commencement, ſhall not be ſo at the Conſummation of the Will, without a new Publication.

Purchaſe by Deviſe, and not by Deſcent.

See Life; Eſtate for Life, 417, 418.

THE Word *Purchaſe*, when it is taken in Oppoſition to *Deſcent*, is where a Man cometh to Land which doth originally veſt in him by *Limitation of Eſtate*, and never was, or by any Poſſibility could be in the *Anceſtor*.

As if a *Remainder* is limited to the *right Heirs* of *R. B.* and he hath Iſſue a Daughter, and dies, ſhe hath the Eſtate by *Purchaſe*, and not by *Deſcent*.

So

So where an Eſtate for Years is given to the Anceſtor, Remainder to another for Life, Remainder to the right Heirs of the Leſſee for Years, there the Heirs ſhall take by *Purchaſe*.

But where an Anceſtor taketh an Eſtate of *Freehold* to himſelf, and in the ſame Conveyance another Eſtate is limitted to his Heirs in Fee or in Tail, there the Word *Heirs* is not a Word of Purchaſe, but they ſhall be in by *Deſcent*. 2 Lev. 60.

From all which it may be collected, that where the *Heir* takes an Eſtate by Deviſe in another Manner than the Common Law would have given it, in ſuch Caſe he takes as a *Purchaſer*; but then he muſt be the *right Heir*: And as none can take as Heir by *Purchaſe* who is not right Heir, ſo none can take by *Deſcent* where the Eſtate was never executed in the Anceſtor. 2 Lev. 79.

'Tis generally true, that where the *Heir* takes by a Will, but accompany'd with a *Charge*, he takes by *Purchaſe*, and not by *Deſcent*: * As a Deviſe of Lands to his Son and Heir, and to his Heirs, *upon Condition* that he *pay* the Father's Debts within a Year; here the Heir hath a Fee-Simple; but being oblig'd by this Condition, he hath it as a *Purchaſer*, and not by *Deſcent*.

† So a Deviſe to his eldeſt Son and his Heirs, within four Years after the Death of the Teſtator, *provided he pay* 20 *l.* to the Executrix towards the Satisfaction of his Debts. He *paid* the Money. Adjudg'd, That he took by *Purchaſe*, and that the Lands were not Aſſets in his Hands; for the Word *Paying*, or to *Pay*, is a *Limitation* of the Eſtate.

'Tis likewiſe generally true, as hath been already obſerv'd, that where the Anceſtor taketh an Eſtate for Life, and in the ſame Conveyance another Eſtate is limited to his Heirs in Fee or in Tail,

See antea Tit. Deſcent, 217. contra.

* Gilpin's *Caſe*, Cro. Car. 161. *Deny'd to be Law*, 3 Salk. 241. *in* Clerke *and* Smith's *Caſe*.

† Britton *verſus* Charnock, 2 Mod. 286

Tail, that the Word *Heirs* in ſuch Caſe is not a Word of *Purchaſe*: And in ſome Books we are told, this is a Rule in Law; and yet I find a Caſe adjudg'd otherwiſe.

Lilly verſus Tayler, Clerk verſus Day, Owen 148. Moor 593. Cro. Eliz. 413.

ſſ. A Deviſe to *Roſe for Life*, and if ſhe have any *Heirs of her Body*, &c. then after her Death that Heir ſhall have the Land, and to the *Heirs of their Bodies* begotten; and if *Roſe* die *without Iſſue*, Remainder over. This is an Eſtate for Life in *Roſe*; and yet her Heirs ſhall take by *Purchaſe*, and not by *Deſcent*, and the Inheritance ſhall be in Abeyance during her Life, and immediately upon her Death veſt in the Heirs as a *Purchaſer*. But this was againſt the Opinion of the Chief Juſtice *Popham*, who held, That where an Eſtate is limited to the Anceſtor for Life, and in the ſame Deed 'tis limited to his Heirs, they ſhall be in by *Deſcent*.

Sparke verſus Sparke, Cro. Eliz. 840. Moor 666. Owen 125. Yel. 9.

Leaſe for *Ninety nine Years, if the Leſſee lived ſo long*; and if he dy'd within that Term, then *after his Death* the Land ſhould remain to his Executors or Aſſigns for 21 Years, which Term he granted to another rendering Rent, and then dy'd Inteſtate. And his Adminiſtrator brought an Action of Debt for Rent againſt the Leſſee for 21 Years; and upon Demurrer to the Declaration adjudg'd, That it would not lie, becauſe the Term for 21 Years was never veſted in the Inteſtate ſo as he might diſpoſe it; for it was not to commence unleſs he dy'd within ninety nine Years, which might not be, for there was a Poſſibility he might ſurvive it; and he dying within that Term, his Adminiſtrator was entitled to it as a Purchaſer, and ſo would his Executor, if he had made one: And thus Serjeant *Moor* reports the Caſe. And Juſtice *Owen*, who reports the ſame Caſe, tells us, that my Lord Chief Juſtice *Anderſon* was of that Opinion, but

Owen 125.

that

that all the other Judges were againſt him; becauſe it was the Intent of the Leſſor, that the Leſſee for ninety nine Years ſhould have an Eſtate during his Life, which appears by making the Leaſe for ſo long a Term, which by common Intendment he could not ſurvive; ſo that it was a Leaſe to him for Life, and to his Executors for 21 Years after his Death.

Deviſe to the next Heir and his Heirs: This is void, and the Deviſee ſhall take by *Deſcent*; for a Man cannot raiſe a Fee-Simple to his own right Heirs by the Name of Heirs as a Purchaſe, either by Conveyance, Uſe, or Deviſe. Plow. Com. 545.

So a Deviſe of Lands, of which the Teſtator was ſeis'd *Ex parte materna*, to the Heirs *Ex parte materna*, the Deviſe is void, and the Deviſee ſhall take by *Deſcent*. Hedges *verſus* Row, 3 Lev. 127.

The Teſtator had two Daughters, one of them had Iſſue a Son, and dy'd; then the Teſtator deviſed his Lands to his Grandſon and his Heirs for ever. The Queſtion was, Whether he ſhall take the whole by the Will, or only one Moiety by Deſcent, and the other Moiety as Coparcener with his Aunt; and adjudg'd, That he ſhall take the whole by the Will. 'Tis true, where an Eſtate is deviſed to an Heir at Law, which would have deſcended to him in the very ſame Plight as if no Will had been made, there he ſhall take by Deſcent; but this was not a Deviſe to the Heir at Law, becauſe both Coparceners make the Heir, and one cannot be Heir alone, therefore the Grandſon muſt take by the Will, and not by Deſcent, becauſe nothing can deſcend to him *ut unicoharedi*. Reading *verſus* Royſton, 1 Salk. 242.

Refuſal.

Refuſal.

BOTH by the Civil Law, and our Law, the Executor may be ſummon'd to accept or refuſe the Executorſhip, but the Time is left to the Diſcretion of the Judge; and if the Party doth not appear upon the *Summons*, and prove the Will, *Townſend* Juſtice was of Opinion the Judge might grant Adminiſtration as if the Teſtator had dy'd Inteſtate, and that ſhall continue till the Executor hath prov'd the Will; but no Man can be compell'd to take upon him the Executorſhip, unleſs he hath intermeddled with the Teſtator's Eſtate; and in ſuch Caſe he may be compell'd; and if he refuſe in Court, and Adminiſtration is granted to another, 'tis wrong.

Br. Abr. tit Admon. 32

Hawkins *verſus* Lewis, 1 Leon. 154

And ſo it was adjudg'd many Years afterwards; as for Inſtance, Sir *David Cunningham* had a Term for Years, and made *David* his Son Executor, and dy'd. The Son prov'd the Will, and made *Hay* and two others Executors, and dy'd: But theſe Executors not proving the Will of *David*, Adminiſtration *de Bonis non, &c.* of Sir *David* was granted to *Bradburne*, who knew nothing of the Will of *David*, and *Bradburne* ſold the Term for a valuable Conſideration. Then two of the Executors dy'd, and *Hay* the third Executor renounc'd; then *Bradburne*'s Adminiſtration was repeal'd, and *Adminiſtration de Bonis non, &c.* was granted to the Defendant. The Queſtion was, Whether the firſt Adminiſtration granted to *Bradburne* before *Hay* the Executor had renounc'd, was good or not? And adjudg'd it was not good; for before the Renunciation, *Hay* had the abſolute Property of the Eſtate in him, and might have ſold the Term before Probate; and if ſo,

Abraham *verſus* Cunningham, T. Jones 72 2 Mod. 146 1 Vent. 303 2 Lev. 182.

ſo, the Adminiſtration granted before the Refuſal of *Hay*, was not voidable, but void, and the Refuſal afterwards cannot relate to make that good which was void for Defect of Power, and ſo the Sale by *Bradburne* is void.

The Perſon to whom the Ordinary grants Adminiſtration, may refuſe it if he will; for the Ordinary hath not Power to compel him to accept it, 34H.6.16.

But in ſome Caſes he cannot refuſe; as where an Executor (after a *Caveat* enter'd) took the *uſual Oath*, and afterwards *refuſed*; then another endeavouring to obtain the Adminiſtration, the Executor who *refuſed* deſir'd to prove the Will, and conteſted the Adminiſtration with the other in the Spiritual Court. But it was adjudg'd againſt him in that Court ſuppoſing he was bound by his *Refuſal*. Then he appealed to the *Delegates*; and pending the Appeal, he mov'd for a *Mandamus* to the Spiritual Court to grant the Probate to him, and he had it; for having taken the Oath, that Court had no further Authority, and therefore he could not be admitted afterwards to refuſe, but they ought to grant the Probate to him, and the *Caveat* did not alter the Caſe. 9Ed.4.33. 1Vent.338

If one Executor refuſes before the Ordinary, and the other prove the Will, yet the refuſing Executor may adminiſter when he will; but if they all refuſe, none of them ſhall adminiſter afterwards. 49Ed.3.17 Moor 373.

But if there is *one Executor*, and he adminiſters, he cannot refuſe afterwards; and if he once refuſeth, he cannot afterwards adminiſter: As for Inſtance, Broker *verſus* Chater, Owen 44.

The Teſtator deviſed a Term for Years to the *Lord Chief Juſtice Catlin*, and made him Executor: He *wrote a Letter* to the Judge of the Prerogative Court, Cro. Eliz. 92. Moor 272. 1Leon.153

Court, that he could not attend the Execution of the Will, and desir'd him to commit Administration to the next of Kin; and Administration was granted accordingly. Afterwards *Catlin* the Chief Justice enter'd, and granted the Term to another. But it was adjudg'd void; for the Letter was a sufficient *Refusal*, and an Executor cannot once refuse, and afterwards take upon him the Executorship.

Middleton's *Case*, 5 Rep. 28.

But where there are several Executors, and some refuse, yet in Construction of Law they continue Executors still; for at any Time during the Life of their Co-executors they may prove the Will, and administer to the Testator's personal Estate, and they may pay Debts due and owing by him, and make Releases of any Debts which were owing to him; and they must be *joined* in Suits where they *are Plaintiffs*, because they are all privy to the Will; but not where they *are Defendants*, because the Plaintiff in the Action is not oblig'd to take Notice of more than those who have actually prov'd the Will.

35 H. 6. 36. Fitz. Executor 26.

Godfrey *versus* Woodward, Cro. Eliz. 858.

Where too Executors are made, and one refuseth, it must be before the Ordinary, as, where Debt was brought against two Executors upon a Bond, one of them was outlaw'd, the other pleaded, That he who was outlaw'd was made Executor, and prov'd the Will alone, and administer'd; and that the Defendant, as Servant to him took the Goods by his Delivery, and travers'd that he administer'd as Executor. And upon Demurrer this was adjudg'd an ill Plea, because he doth not say, that he refused *before the Ordinary*, nor confesseth any Administration; and so no Answer to the Plaintiff.

Remainder.

Remainder.

THIS is an Eſtate limited either by Deed or Will, to commence after the Determination of a particular Eſtate on which it muſt depend; and the very Word itſelf imports that it muſt be a Remainder of ſomething which is in being. And here I ſhall mention thoſe Caſes which I find concerning,

(1.) *Remainders veſted.*
(2.) *Remainders in Contingency.*
(3.) *Croſs Remainders by Will.*
(4.) *Remainders of Chattels deviſed.* See *Chattels.*

(1.) A Deviſe of Lands to *R. B. from Michaelmas next* for five Years, Remainder to the Plaintiff and his Heirs. *R. B. died before Michaelmas.* Now tho' this Remainder could not veſt immediately upon the Death of *R. B.* becauſe his Intereſt was not to commence *'till Michaelmas*, and he dy'd before; yet in the Caſe of a Deviſe a *Freehold* may be in Expectance, and in the mean Time it ſhall deſcend to the Heir, and veſt in him. Pag's *Caſe*, Cro. Eliz. 878. Noy 43.

The Teſtator had Iſſue two Sons and a Daughter, and he deviſed his Lands to his Wife *for ten Years*, the Remainder to his youngeſt Son and his Heirs, and if any of his two Sons die without Iſſue, the Remainder to his Daughter and her Heirs. The youngeſt Son dy'd in the Life of his Father, and then the Father dy'd; adjudg'd, This was a good Remainder to the Daughter, being upon a Deviſe, tho' the *particular Eſtate* fails. Dyer 122. Rickman's *Caſe*,

Thomas Goddard being ſeis'd in Fee of Lands in *Oſborne*, deviſed them to his Couſin *Edward Goddard* for Life, *if he ſhould be living at the Death of Thomas*, if not, then to *Edward the Younger for* Gold *verſus* Goddard, T. Jones 111.

Life, if he ſhould be then living; if not, then to *remain to the next Heir Male of the Body of Edward the Younger*, and *for Default of ſuch Iſſue Male, then to the next Heir Male of the Body of Edward the Elder*, with other Remainders over in Tail Male. *Thomas* the Teſtator dy'd; *then Edward the Elder died*, leaving Iſſue *Edward* his Son. And the Queſtion was, Whether the *Son* had any Eſtate by the Will? It was objected, that he had none by expreſs Words, unleſs his Father had dy'd in the Life-time of the Teſtator, which he did not; neither could he take as Heir Male of the Body of *Edward* his Father, becauſe the Eſtate for Life and the Remainder make but one Eſtate; and the Eſtate for Life never veſting in the Father, the Remainder ſhall never veſt in his Son. But adjudg'd, That the Clauſe, *viz. And for Default of ſuch Iſſue Male, then to the Heirs Male of Edward the Elder*, is not a Limitation under any Manner of Contingency, as the firſt Part of the Will is, but ſtands abſolutely by itſelf; and 'tis a good Limitation of the Remainder after the Death of the Father, which ſhall then take Effect in his Son.

(2.) *A Contingent Remainder is where the Eſtate limited* in futuro *ſhall ever veſt or not, 'tis ſupported by a particular Eſtate:* And this Remainder, before the Statute 10 & 11 *Will.* muſt veſt either before, or at that very Inſtant in which the particular Eſtate determines, or it ſhall never veſt; for if the particular Eſtate was determin'd before the Contingency happen'd, the Remainder was void: And ſo in *Archer's* Caſe,

cap. 16.

Archer's Caſe, 1 Rep. 66.

Archer's Caſe, 1 Rep. 66. *If.* The Teſtator being ſeis'd in Fee, deviſed it to *Robert his Son and Heir* for Life, Remainder to the next Heir Male of *Robert*, and to the *Heirs Males of the Bodies of ſuch Heirs Males*, and dy'd. *Robert* made a *Feoffment in Fee.* Adjudg'd, That he

he had only an Eſtate for Life by the expreſs Words of the Will; and by his *Feoffment* the contingent Remainders were deſtroy'd, becauſe here being a particular Eſtate for Life to ſupport ſuch Remainder by Rule of Law, it ought to veſt *eo inſtanti*, in which that Eſtate determines. Now though *Robert* was *Heir* at Law, and by Conſequence the Fee-Simple deſcended on him, yet the *Remainder to his next Heir Male* was contingent; for by the Deſcent of the Fee, his Eſtate for Life was not merg'd, but it was determin'd by his *Feoffment*, and by Conſequence the Remainder deſtroy'd.

So where the Deviſe was to his *eldeſt Son Thomas for Life*, and *if he die without Iſſue living at the Time of his Death*, to *Leonard* and his Heirs; *but if* Thomas *have Iſſue living* at the Time of his Deceaſe, then to him and his Heirs. *Thomas* ſuffer'd a Recovery, and dy'd without Iſſue. It was inſiſted in the Behalf of *Leonard*, that *Thomas* had a Fee-ſimple deſcended on him as *Heir at Law*, by which his Eſtate for Life was *drowned*; and if ſo, this muſt be an executory Deviſe to *Leonard*, and by Conſequence not barred by this Recovery; for wherever the *whole Fee* is veſted in one, and limited to another upon a *Contingency*, (as in this Caſe it was limitted to *Leonard*, if *Thomas had no Iſſue living at his Death)* it muſt be an executory Deviſe; for it could not be a Remainder to *Leonard*, becauſe one Fee cannot remain upon another. 'Tis true, where only *Part* of the Eſtate is deviſed as *for Life*, or *in Tail*, and not the *whole Fee*, and the *Reſidue* is given to another upon a *Contingency*, that muſt veſt as a *Remainder*. But it was adjudg'd according to *Archer*'s Caſe, That *Thomas* had an Eſtate for Life by the expreſs Words of the Will; and though the Reverſion in Fee deſcended on him as *Heir*, yet it did not deſtroy

Plunkett *verſus* Holms, 1 Sid. 47. 1 Lev. 11. Raim. 29.

See in the Caſe of Pell *and* Brown 232.

that expreſs Eſtate for Life againſt the Intent of the Teſtator; but that Eſtate for Life was deſtroy'd by the Recovery, and a Fee was thereby veſted in him, and by Conſequence all the Remainders were deſtroy'd.

Reeve *verſus* Long, 3 Lev. 403. 4 Mod. 282.

And to ſhew that a *Contingent Remainder* muſt veſt *eo inſtanti*, that the particular Eſtate determin'd, this Caſe happen'd, *viz. John Long* being ſeis'd in Fee of Lands in *Melkſham* in *Wiltſhire*, deviſed it to his Nephew *Henry Long*, the eldeſt Son of his Brother *Richard*, for Life; Remainder to his firſt Son in Tail; Remainder to *Richard*, the ſecond Son of his Brother *Richard*, for Life; Remainder in Tail to his firſt, and all his other Sons; Remainder over. *Henry* enter'd, and dy'd before any Son born, but left his Wife with Child. *Richard* enter'd as in Remainder, and about ſix Months afterwards a Son was born. Adjudg'd, That this being a Contingent Remainder to the firſt Son of *Henry*, and that Son not being born when the particular Eſtate for Life determin'd by the Death of his Father *Henry*, the Remainder to him was void; and *Richard* being the next in Remainder, and entering before the Son was born, it was veſted in him, and he was now in by *Purchaſe*, and ſhall not be put out by the after born Son of *Henry*. And this Judgment was affirm'd in *B. R.* but revers'd in the Houſe of Peers; for it being in the Will, it ſhall be taken according to *Equity*, and according to the Meaning of the Teſtator, which could never be to diſinherit the Heir of his Name and Family upon ſuch a Nicety, who was not then born.

Tailor *verſus* Uſherwood, Allen 8.

In a ſpecial Verdict in Ejectment the Caſe was, The Teſtator deviſed Lands to *Elizabeth* for Life, and after her Deceaſe to the eldeſt Heir Male of her Body in Tail Male, *ſo that he be of*

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the Age of 24 Years at the Time of her Death; but if he be not of that Age, then to her Husband, till the Son come of that Age, to dispose the Profits amongst the younger Children. The better Opinion was, That those Words did not make a *Contingent Remainder* upon the Son's being of the Age of 24 Years, because the Testator had fill'd up the Space of Time by a Disposition of the Profits to the Husband.

And because such Cases might often happen in Wills, therefore the Statute 10 & 11 *Will.* was made, by which 'tis enacted, *That where any Estate is limited in Remainder to any Person or Persons who shall be born after the Decease of his Father, such Person shall take in the same Manner as if he had been born in the Life-time of his Father, although no Estate is limited to Trustees after the Decease of the Father, to preserve such Contingent Remainders to such after-born Son until he shall be born.* 10 & 11 Will. cap. 16.

A little before this Statute the Testator devis'd his Lands to his Uncle *Ewers Armin for Life, without Impeachment of Waste*, and if he hath Issue Male, then *such Issue Male and his Heirs for ever*; and if he die without Issue Male, then to his Nephew in Fee. This was adjudg'd an Estate for Life in the Uncle; for if it had been an Estate Tail, it had been impertinent to add those Words, *Without Impeachment of Waste*; and the Inheritance being vested in the *Issue Male and his Heirs* these Words *his Heirs* make it certain what *Issue Male* was intended; and then the Words which follow, *viz.* if he *die without Issue*, must not be taken absolutely, but relatively to what went before, *viz.* if he die without such Issue, who might take Inheritance as before is appointed in the Will, for otherwise Lodington *versus* Kime, 3 Lev. 431.

thoſe Words would make an Eſtate Tail by Implication to deſtroy an expreſs Eſtate limited to the *Iſſue Male and his Heirs* before, which muſt not be allow'd; but one of the Judges held, this was a Contingent Remainder to the Iſſue of the Uncle and his Heirs, according to *Plunkett*'s Caſe; and he having ſuffer'd a Recovery before the Contingency happen'd he deſtroy'd thoſe Remainders.

Goodright *verſus* Cornish, 4 Mod. 254 1 Salk. 226.

Deviſe to his eldeſt Son for 50 *Years*, if he ſo long liv'd, and after the Determination of that Eſtate, then to the *Heirs Males of his Body*; and for want of ſuch Iſſue, Remainder over: This is a *contingent Remainder*, and void, becauſe there was nothing but a *Term for Years* to ſupport it.

(3.) Where a Deviſe is to two, and that *each ſhall be the other's Heir*, this makes *croſs Remainders*; but ſuch croſs Remainders are ſeldom allow'd by *Implication*; as for Inſtance;

Gilbert *verſus* Witty, 2 Cro. 655. 2 Roll. Rep. 281.

The Teſtator had two Sons and two Houſes, and he deviſed one Houſe to his eldeſt Son, and his Heirs, the like to the ſecond and his Heirs, *provided*, that if *both* my ſaid Children depart this Life * *without Iſſue of their Bodies*, then *all* my ſaid Houſes ſhall be to *Margery* and her Heirs; the eldeſt Son dy'd without Iſſue, the youngeſt had Iſſue a Daughter; adjudg'd, That *Margery* ſhall have the Houſe of the eldeſt immediately, and that the Proviſo doth not make *croſs Remainders to the Sons by Implication* from one to the other, becauſe the Houſes are deviſed to them ſeverally by expreſs Limitation.

* Rolls reports it, *Heirs of his Body.*

Holmes *verſus* Meynell, Raim. 452. T Jones 172

But where the Teſtator deviſed his Lands to his two Daughters and their Heirs, *equally to be divided between them*; and if ‖ they die *without Iſſue*, then *all* his Land to his Nephew *Francis* in Tail; the youngeſt dy'd without Iſſue. The Queſtion was, Whether the ſurviving Siſter ſhall have the

‖ *Doth not ſay, if either of them die.*

the whole by Way of *Remainder by Implication*, or whether *Francis* ſhall have it? Adjudg'd, That the Daughters had ſeveral Eſtates Tail by Moieties, and that the Survivor ſhall have the whole by Way of croſs Remainder, and that *Francis* ſhall have nothing by Implication, till both are dead without Iſſue.

As croſs Remainders are allow'd amongſt Two, ſo they are ſeldom allow'd amongſt Three or more, unleſs the Words do very plainly expreſs the Intent of the Teſtator that it ſhould be ſo: As for Inſtance; If one Acre is devis'd to the eldeſt Son, another to his ſecond Son, and the Heirs Males of his Body, another to the third Son and the Heirs Males of his Body, and if they *all happen to die without Iſſue of their Bodies*, or of any of their Bodies lawfully begotten, Remainder over; there by Reaſon of theſe Words, *or of any of their Bodies* croſs Remainders ariſe, but it would be otherwiſe if thoſe Words were left out; and ſo is the Caſe of *Gilbert* and *Witty* before-mention'd. Dyer 303.

(4.) Deviſe of his *Goods* to his Wife for Life, and after her Deceaſe to *R. B.* this Deviſe of a *Remainder of Goods* is void, becauſe where the *Goods* themſelves are devis'd there can be no Remainder over; but 'tis otherwiſe, where the *Uſe* or Occupation only is deviſed, becauſe one Man may have the *Uſe*, and another the *Property*. March 106

Having in the proper Place omitted a Caſe or two of Remainders veſted, it may not be improper to mention them here.

Deviſe to *Peter* in *Tail*, with divers Remainders over, *Provided if any of the Remainder-Men alien the Land, that then his Eſtate ſhould ceaſe, as if he was naturally dead. Peter* levy'd a Fine, and ſold Germin verſus Arſcott. 1 And. 186. 2 And. 7. 1 Rep. 85. Moor 364. 4 Leon. 83.

ſold the Eſtate; adjudg'd, That a Proviſo to determine an Eſtate Tail upon an *Alienation* was void; for as a Man cannot deviſe an Eſtate *in Fee* to one, and that if he doth not ſuch an Act his Eſtate ſhall ceaſe, and another ſhall have it; for when once he had devis'd the Fee, he hath not Power in the ſame Will to deviſe it to another; ſo, where once he hath given the Land *in Tail* with a *Remainder* over, he cannot by Rule of Law determine that Eſtate Tail as to one, and diſpoſe it to another.

Foy *verſus* Hind, 2 Cro. 696. W. Jones 56 2 Roll. Rep. 467.

So a Deviſe to the Heirs Males of his Body, and for Default of ſuch Iſſue, to *Henry* and the Heirs Males of his Body; and for Default of ſuch Iſſue to *Thomas*, and the Heirs Males of his Body, with divers Remainders over in Tail Male; and farther, that Lands ſhould remain to *Henry* and the Heirs Males of his Body, until he or they ſhall do, or go about to do any Act *to alter or diſcontinue* the Eſtate Tail, then that the Lands ſhould remain to *Thomas* and the Heirs Males of his Body, with the like Limitations to him and to all the reſt in Remainder. *Henry* enter'd, *Thomas* dy'd leaving Iſſue *Richard*, then *Henry* levy'd a Fine, and declar'd the Uſes to him and his Heirs: Adjudg'd, That *Thomas* had a Remainder veſted by the firſt Part of the Will, and not a contingent Remainder which depended upon the Alienation or Diſcontinuance of *Henry*; and that the Teſtator could not determine ſuch a ſettled Remainder, and give another a Title to enter upon the *Alienation* of the Tenant in Tail in Poſſeſſion, becauſe that would be to make a Perpetuity, for if it could be done to one, it might be done to more, therefore the Remainder to *Thomas* being ſettled, and not depending on any Contingency, 'tis diſcontinu'd and barr'd by the Fine,

Fine, and by Conſequence *Richard* his Son can have no Title; for 'tis not a Limitation to him to enter, but after the effectual going about of *Henry to alien*, and 'tis not effectual till the Act is done; and when the Act is done, the Remainder is diſcontinu'd, and then 'tis too late for him to enter.

And this is directly within the Rule in *Pleſington's* Caſe, *viz. John Burwarſh* levy'd a Fine of the Mannor of *B.* to *Robert Pleſington*, and becauſe the Leſſees would not attorn, *Pleſington* brought a *quid Juris clamat* againſt them; they pleaded, That before the Fine levy'd, *John Burwarſh* demiſed the Mannor to them for Eleven Years, and that if *he aliened*, or dy'd within the Term, that then they ſhould enjoy it during Life, and that he had aliened to *Pleſington*; this was adjudg'd no good Plea, becauſe the Alienation was an intermediate Eſtate between that of the Cognizor and the Defendants; and when *Burwarſh* had aliened to *Pleſington*, 'tis too late for the Defendants to claim a Freehold, becauſe the Title did not commence 'till the Eſtate veſted in *Pleſington*. 6 R. 2. Fitz Abr. Quid Juris

The Grandfather being ſeis'd in Fee devis'd it to the Father for Life, Remainder to the Son, and the Heirs Males of his Body, Remainder to the right Heirs Males of the Teſtator, and to the Heirs Males of their Bodies begotten. The Grandfather and Father dy'd, the Son had Iſſue only a Daughter, and her Huſband and ſhe ſold the Land; adjudg'd, That the Sale was good; for immediately upon the Death of the Grandfather, the Remainder veſted in the Father as right Heir in Fee-Simple, which cannot be turn'd into an Eſtate Tail by Matter ſubſequent. Smith *verſus* Havers, Cro. Eliz. 96.

The

Brown verſus Cutter, Raim. 427.

The Teſtator, *John Cheeke*, devis'd his Lands in *Thames-Ditton*, to his Wife for Life, *if ſhe do not marry*; but *if ſhe marry*, then *Humphrey* (who was his eldeſt Son) ſhall preſently enter and enjoy the ſaid Lands to him and the *Heirs Males of his Body*, Remainder over in Tail Male: It was inſiſted, That this was a contingent Remainder to *Humphrey*, which was to ariſe upon the Marriage of his Mother, and ſhe dying unmarry'd, and by Conſequence that Contingency never happening, the Remainder did never veſt in him; and if ſo, then *Humphrey* takes an Eſtate in Fee by Deſcend, and ſo the Land will deſcend from him to a *Female*, who was his Heir at Law, and not to a *Male*, as it would have done if it had been a Remainder veſted: But adjudg'd, That this was not a *Contingent Remainder*, for the Widow had an Eſtate for Life determinable upon her Marriage, and then the ſubſequent Words, *viz. If ſhe do marry*, ſignify no more than if he had ſaid, if her Eſtate ſhall determine upon her Marriage then *Humphrey* to enter; ſo it being to determine either upon her *Death* or Marriage, 'tis an Eſtate veſted in *Humphrey* to take Effect in Poſſeſſion upon either.

Rent.

RENTS may be deviſed as Lands, and this may be ſeen in the Caſes following; and firſt, what paſſeth by a Deviſe *of Rent*.

Kerry verſus Derrick, Moor 640, 771. 2 Cro. 104.

If. The Teſtator being ſeiſed in Fee of Lands in *Egham* and *Staines*, made ſeveral Leaſes thereof, reſerving Rent of the ſeveral Sums of 10 *l.* and deviſed one Rent of 10 *l. per Annum*, iſſuing out of his Lands in *Egham* to his Wife for Life, and his Houſe in *Staines* to her for ever. The better Opinion

Opinion was, That by the Deviſe of the Rent the Land did not paſs, yet ſhe ſhall have a Rent of 10 *l. per Ann.* iſſuing out of the Land, if ſhe live after the Leaſe expire. This was the Opinion of Juſtice *Gawdy* upon a Reference out of *Chancery*, but the other Judges doubting, it was tried at Bar; and adjudged, that by the Word *Rent*, the Lands did paſs.

There was a grant of a Rent to the Huſband during the Life of his Wife's Mother, with a Clauſe of Diſtreſs for him and *his Heirs* to diſtrein during her Life; the Huſband deviſed this Rent to his Wife, and died in the Life-time of the Mother; adjudgd, That by Reaſon of the Word *Heirs*, the *Rent* was not determined during her Life, for the Huſband had a Fee-Simple determinable on her Death. Vernon *verſus* Gatacie, Dyer 253.

Leſſee for 30 Years made a Leaſe for 28 Years rendring Rent, and then he deviſed the Rent to three Perſons equally; one of them brings an Action of Debt for the Rent, for his Part; and adjudged, That it was well brought; for the Rent is apportionable, and by the Deviſe, the Tenant of the Land is chargeable to each Deviſee, with Attornment. Arden *verſus* Watkyns, Moor 549. Cro. Eliz. 637, 651.

The Defendant being ſeiſed in Fee, had three Sons, *Edward*, *Anthony* and *Fabian*, and deviſed his Lands to his Wife for Life, then to *Anthony* and his Hers; and if *Fabian* lived 'till the Lands came to *Anthony*, then he deviſed, that *Anthony* (but did not ſay his Heirs) ſhould pay *Fabian* 10 *l.* every Year, during his Life; the Lands came to *Anthony*, he paid *Fabian* the Rent yearly, and died. Adjudged, That Iſſue of *Anthony* ſhall pay the Rent; for 'tis a *Rent-ſeck*, and the Lands are charg'd with it in the Hands of the Heirs or Aſſigns of *Anthony*. Andrews *verſus* Sheffield, Moor 721.

A De-

Molineux verſus Molineux, 2 Cro. 144.

A Deviſe of Rents, which are expreſs'd in ſeveral Writings ſign'd by the Teſtator; this is a good Deviſe of the Rents themſelves, for it refers to the Writings, and is a Deviſe of the Rents, as if ſpecially limited in the Will.

Repeal.

THE Ordinary, after he hath granted Adminiſtration to one, may repeal it, and grant it to another; and the Reaſon given in the old Books, is, becauſe by ſuch grant an *Authority* only, and no *Intereſt* paſſeth, and all Powers and *Authorities* are revokable in their Nature.

34 H. 6. 14.

4 H. 7. 14.

But it muſt be a Miſtake to ſay, That an *Intereſt* doth not paſs, becauſe 'tis held, that all intermediate Acts done by the firſt Adminiſtrator ſhall ſtand, which could not be, if an *Intereſt* did not paſs.

Packman's Caſe 6 Rep. 18. 6. Cro. Eliz. 459. Moor 396.

And with this the later Authorities agree; as for Inſtance, a Man died inteſtate, the Ordinary granted Adminiſtration to a Stranger, who was cited by the next of Kin to have it repeal'd, pending which Suit the Adminiſtrator ſold the Goods, and then the Adminiſtration was repeal'd; and in Trover by the new Adminiſtrator, it was adjudged, That the Sale was good, which proves, that the firſt Adminiſtrator had an abſolute Property in him, and ſuch a Property, that tho' his Adminiſtration had been fraudulent, it had been good againſt the ſecond Adminiſtrator, tho' by the Statute 13 *Eliz.* it had not been good againſt Creditors.

Cap. 6.

Price verſus Parkes, 1 Sid. 280. 1 Lev. 157.

Neither is it true, that the Ordinary may *repeal* an *Adminiſtration* at his Pleaſure; as where Debt for Rent was brought by an Adminiſtrator, the Defendant pleaded, that the Adminiſtration granted to the Plaintiff, was duly repeal'd and gran-

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ted to another. The Plaintiff reply'd, That he was next of Kin to the Inteſtate, and that he had appeal'd from that Sentence; and upon Demurrer it was adjudg'd, That the Ordinary having granted Adminiſtration to the next of Kin, according to the Statute, he had executed his Power, and had nothing farther to do; for he could not revoke it, unleſs for juſt Cauſe, as that it was unduly obtain'd, or that the Adminiſtrator was a Lunatick. *See* Adminiſtration 62.

So where there was a Brother and two Siſters, one of them marry'd, and the other died Inteſtate. The Brother enter'd a *Caveat*, and yet the Ordinary granted Adminiſtration to the marry'd Siſter. The Brother brought an Appeal, and upon a Motion for a Prohibition, adjudged, That where there are two in *equali gradu*, and Adminiſtration is granted to one, the Ordinary cannot repeal it, but for ſome good Cauſe; for if it ſhould be repeal'd for Matter of Form, it ought to be regranted to the ſame Perſon; but ſince this was granted after a *Caveat*, which is in nature of a *Superſedeas*, the Court was divided, whether it ought not to be repeal'd for that Reaſon. Offley *verſus* Beſt. 1 Sid. 293. 372. 1 Lev. 186. Betiſworth *verſus* Betiſworth, Stiles 10. S. P.

But if an Adminiſtration is granted where it ought not, or if 'tis granted *inverſo Ordine*, there, notwithſtanding the Statute, it may be repeal'd: As for Inſtance, if 'tis granted by the Biſhop of the Dioceſe, when the Inteſtate had *Bona Notabilia*, in ſuch Caſe it may be repeal'd. Ravenscroft *verſus* Ravenscroft, 1 Lev. 305.

And 'tis very certain after an Adminiſtration is repeal'd, that the Authority of the Adminiſtrator is determined; for if he obtain Judgment in an Action of Debt on a Bond due to the Inteſtate, and then the Adminiſtration is repeal'd, he cannot proceed to execute that Judgment; if he doth, the Party will be diſcharg'd upon a Motion, becauſe the Execution *erronicé emanavit*: For he had Barnhurſt *verſus* Yelverton, Yel. 83. 1 Brown. 91

no

no Authority, but by Virtue of a Commiſſion from the Ordinary; and when that was determin'd, his Authority ceas'd.

Turner *verſus* Davis, 1 Mod. 62, 2 Sand. 148

So where an Adminiſtrator had Judgment in Trover for Goods of the Inteſtate, taken out of the Poſſeſſion of the Adminiſtrator himſelf, then the Adminiſtration was repealed, and granted to another. The firſt Adminiſtrator ſhall not have Execution upon that Judgment, becauſe tho' the Converſion was in his Time, yet he recover'd as Adminiſtrator, and the Damages ſhall be Aſſets, and his Adminiſtration being repeal'd his Title was determin'd.

Kett *verſus* Life, Yel. 125.

And yet I find, that where a Verdict was obtain'd in Trover by an Adminiſtrator, and before the Day in Bank; the Defendant pleaded, that the Letters of Adminiſtration were granted to another, (the former being repealed) this was held no good Plea, becauſe the Defendant might be relieved by an *Auditâ Querelâ*, which was the moſt proper Remedy, and not by a Plea.

Criſp's Caſe, Latch. 190

The Huſband dy'd inteſtate, and one who ow'd him Money, paid it to his Widow, to whom the Adminiſtration did belong; but afterwards it was granted to a Stranger, who ſued the Debtor in the Mayor's Court, where it was decreed, that he ſhould pay it to the Adminiſtrator; but in the Court of Conſcience it was decreed, that he ſhould not have the Money, becauſe it was paid to her to whom the Adminiſtration did belong; whereupon the Adminiſtrator ſued out a *Procedendo ad Judicium*; adjudg'd, That the Court of B.R. could not examine, whether this Decree were equitable, ſo long as the Court of Conſcience did not tranſgreſs any fundamental Rule of Common Law.

I like-

I likewiſe find, that ſome intermediate Acts done by the firſt Adminiſtrator, ſhall not ſtand after his Adminiſtration is repeal'd, as if he releaſes all Actions, *&c.* and afterwards by a Sentence in the Eccleſiaſtical Court, his Adminiſtration is repeal'd and made void; it was adjudg'd, that this Releaſe is void. Throgmorton *verſus* Hobby, 1 Brownl. 51.

And, which is a harder Caſe, *viz.* the Teſtator made two diſtinct Wills, and appointed an Executor to each Will, the Executor of the firſt Will proved it, and received a Debt, and gave a Releaſe not knowing there was any other Will. Afterwards, the firſt Will was repealed, and the ſecond Will proved, and that Executor brought an Action of Debt againſt the Perſon who had paid the Money to the firſt Executor, and who had a Releaſe; and it was adjudg'd, that the Action did lie, and that the Payment and Releaſe was no Bar to it; for tho' it was a hard Caſe upon the Executor of the firſt Will, and upon the Perſon who had paid the Money, who knew nothing of any other Will, yet it would be more inconvenient, that it ſhould be in the Power of the Ordinary to make any other Executor, than whom the Teſtator hath made. See *Guiſbrook* verſus *Fox* ante 466. Greves *verſus* Weigham, 1 Roll. Abr. 919.

Adminiſtration was granted, and the Adminiſtrator poſſeſſed himſelf of a Term for Years, and made an Under-Leaſe; afterwards upon a Citation to repeal this Adminiſtration it was affirm'd; from which Sentence there was an Appeal, and thereupon the former Sentence was repealed, and Adminiſtration granted to another; adjudged, That the new Adminiſtrator ſhall not avoid this Leaſe; for 'tis no more than a Repeal of the Sentence on the *Citation*, and ſo 'tis in Nature of a Suit upon the Citation, and the ſame Thing as if the firſt Adminiſtration had been avoided Semine *verſus* Semine, Simms *verſus* Simms, Raim. 224. 2 Lev. 90

avoided upon that Suit, and not as if the Appeal had been brought originally upon the firſt Adminiſtration; for if ſo, it had been wholly made void.

Bowles *verſus* Clerke, Stiles 221. As to the Repeal of Wills, it hath been adjudged, That if Lands and Goods are deviſed, the Prerogative Court have no Power to repeal the Will, as to the Lands; but if they ſhould endeavour it, a Prohibition lies, as was firſt ſuggeſted; but afterwards it was denied by the Court, becauſe there would be no ſuch Diviſion made of a Will by a Prohibition, as to ſtand good in Part, and be repeal'd for the Reſt.

Reſiduary Legatee.

6 H. 7. 5. IF there are ſeveral Executors, and one of them is made Reſiduary Legatee, he may retain that *Reſiduum* againſt the reſt; and if any of them takes it away, he may have an Action of Treſpaſs.

But where a Man makes an Executor, and gives him a Legacy, and doth not diſpoſe the *Reſidue* of his perſonal Eſtate, the Executor ſhall not have it *Quatenus* Executor; but the next of Kin ſhall have Adminiſtration of it, and it ſhall be diſtributed according to the Statute 22 & 23 *Car.* 2. *cap.* 10.

1 Shore 26. If a Man is made *Reſiduary Legatee*, and he dies before a Probate of the Will, his Executor ſhall have Adminiſtration, and not the next of Kin to the firſt Teſtator.

ante 64.

2 Ch. Rep. 124. Where there are ſeveral *Reſiduary Legatees*, they muſt all join; and where the Teſtator deviſed, that the Quantity and Proportion to each ſhould be as his Executor ſhould voluntarily, and without Compulſion at Law, declare; and the Executor had declared what the Reſiduary Eſtate was,

Gibbons *verſus* Dawley, 2 Ch. Rep. 198.

and

and had paid all but one, yet he might exhibit a Bill, and have an Account.

The Teſtator gave a Legacy of 5 *l.* a-piece to two Legatees, whom he made Executors, and died, without diſpoſing the Reſidue of his Eſtate. The Will was prov'd in common Form, and the Daughter of the Teſtator ſued for a Diſtribution of the Reſiduary Part; for that the Executors had no Title to it, becauſe each of them had a ſpecifick Legacy, and the Court compell'd them to exhibit an Inventory, in order to make a Diſtribution; but a Prohibition was granted, upon a Suggeſtion that the Court had not any ſuch Power, but only where the Party died inteſtate. Petit *verſus* Smith 5 Mod. 247

See *Aſſets.* 98. *Co-Executors* 126. 169. *Debtor made Executor.* 208. *Dying, &c.* 259. *Executor of Executor.* 270. *Probate* 469.

Retainer.

See *Debtee-Executor.* 202.

THE Caſes where an Executor or Adminiſtrator may *retain* for a Debt due to themſelves, are as follow:

We are told out of the Year-Books, that one *Executor* may retain ſo much of the Teſtator's Eſtate, as will ſatisfy a Debt due to himſelf; but that an *Adminiſtrator* cannot, which hath been otherwiſe adjudged ſince. 12 H. 4. 21.

And if the Teſtator pawn Goods, and doth not leave ſufficient to redeem them, the Executor may do it, and retain thoſe Goods to his own Uſe. Dyer 2. Keilw. 63. *See* Aſſets 100.

So where an Executor with his own Money payeth the Debt of his Teſtator, he may retain his Goods to the Value of the Debt; and if an Action is brought againſt him as Executor, he may give ſuch Payment in Evidence upon the Plea of *Plene Adminiſtravit*, becauſe by the Payment of the Teſtator's Debts to the Value of his Goods, the Property Shelley *verſus* Sackvile, 1 And. 24. Cleydon *verſus* Spenſer, Moor 2. S. P.

perty of them is alter'd; and the Money being paid for the Uſe and Benefit of the Deceaſed, that makes it a juſt and right Adminiſtration.

Martin *verſus* Whipper, Cro. Eliz. 115.

The Teſtator ow'd 100 *l.* on *Bond*, and Goods to the Value of 100 *l.* the Executor took in the *Bond*, and gave another in his *own Name* for the Debt; this was adjudged a good Payment, and that he ‡ might retain the Goods to ſatisfy himſelf as if he had actually paid the Money.

‡ Stamp *verſus* Hutchins, 1 Leon. 111 Moor 260. S. P. Cro. Eliz. 120.

W. became bound to * *Burnet* and another, in ſeveral Bonds, and died; *Dixie* adminiſter'd, and afterwards *Burnet* made him Executor and died; adjudged, That *Dixie* might retain the Goods which he had as *Adminiſtrator*, to ſatisfy the Debt due to him as *Executor*.

* Burnett *verſus* Dixie, 1 Roll. Abr. 922.

† Two Executors, one of them pays a Debt owing by the Teſtator, he may *retain* againſt the other; and where there is but ‖ one Executor, he may retain for a Debt due to himſelf upon *Simple-Contract* of the Teſtator; for though an Action of Debt doth not lie againſt an Executor upon ſuch a Contract, yet 'tis a Duty, and if he doth not take Advantage in pleading, it ſhall bind him.

† 1 Roll. Abr. 923.

‖ Sleddal *verſus* Bowerbank, 1 Roll. Abr. 923.

And as an *Executor* ſo an *Adminiſtrator* may retain to ſatisfy a Debt due to himſelf, becauſe he comes in by Act of Law, *viz.* by a Grant of the Ordinary, who by Vertue of the Statute 31 *Ed.* 3. hath Power to grant Adminiſtration.

Bond *verſus* Green, Godb. 217. 1 Roll. Abr. 922.

An Infant was made Executrix, and her Mother took out Adminiſtration *durante Minore Ætate*, and enter'd into ſeveral Bonds to the Creditors, and afterwards married; adjudged, That her Husband might retain ſo much of the Goods of the Teſtator as amounted to the Value of thoſe Bonds: But it may be a Queſtion, Whether he could do it, if his Wife had been dead, becauſe he is then no longer chargeable with the Bonds; but, it ſeems,

Briers *verſus* Goddard, Hob. 250. 1 Roll. Abr. 923.

ſeems, if he had declared in her Life-time, that he would keep the Goods in diſcharge of the Bonds; in ſuch Caſe the Property is alter'd, and veſted in him, and then the Death of his Wife ſhall not diveſt it.

The Plaintiff declar'd againſt the Defendant as Executor, who pleaded, that *W. R.* made his laſt Will, &c. and that he (the Defendant) *ſuſcepto ſuper ſe onere Teſtamenti prædict'*, did pay ſeveral Sums due on Specialties; and that ſo much was owing by the Teſtator to his (the Defendant's) Wife; and that he retain'd Goods of that Value to ſatisfy that Debt, and had no other Aſſets; and upon a Demurrer to this Plea, it was adjudged ill, becauſe by this Plea it did not appear, but that the Defendant might be *Executor de ſon Tort*, and as ſuch he cannot retain; therefore he ſhould have entitled himſelf to the Executorſhip in his Plea; 'tis true, the Plaintiff hath declar'd againſt him as Executor, but that will not make him ſo. Atkinſon *verſus* Rawſon, 1 Mod. 208

There was a *Decree in the Exchequer* againſt the Teſtator, for Payment of Money, who died, and a *Scire Facias* was brought againſt his Executor, who pleaded, that the Teſtator was indebted to him in ſo much Money, by Bond; and that he retain'd to the Value to pay himſelf, before this *Scire Facias* was brought, and before he had any Notice of the Decree; and upon a Demurrer to this Plea, it was adjudged ill, and no Bar, becauſe a Decree in Equity obliges an Executor in equal Degree with a Judgment at common Law. Shafto *verſus* Powell, 3 Lev. 355.

Debt upon Bond againſt the *Adminiſtratrix of John Godolphin*, during the Minority of *Rebecca* his Daughter, and this was for 168 *l.* The Defendant pleaded, That *John Godolphin* was bound in a Bond of 6000 *l.* to one *Wallis*, &c. Truſtee for her, upon her Marriage with the ſaid *Godolphin*, condition'd *to pay her* 3000 *l.* within 14 Days after Roskelly *verſus* Godolphin, Raim. 483.

his Death, if ſhe ſhould ſurvive him; and avers, that ſhe did ſurvive, and that ſhe had not Aſſets *ultra* 1000 *l.* to pay the ſame, which *ſhe retain'd* towards Satisfaction of the ſaid 3000 *l.* And upon Demurrer this was adjudged a good Plea; for tho' the Bond was made to *Wallis*, yet the 3000 *l.* *was to be paid to her*, and ſhe is now Adminiſtratrix, and therefore cannot pay herſelf, and by Conſequence the Payment muſt be by *Retainer*; but if the Money had been to be *paid by* Wallis, tho' in Truſt for her; in ſuch Caſe ſhe could not plead a Retainer.

Bathurſt's *Caſe*, 2 Vent. 40.

Benjamin was Executor to *Arthur*, and *Charles* was Executor to *Benjamin*, and *Daniel* was Executor to *Charles*; the Plaintiff brought an Action formerly againſt *Charles*, as Executor to *Benjamin*, who was Executor to *Arthur*, and got Judgment againſt him in Debt, and now he brought an Action againſt *Daniel*, Executor of the ſaid *Charles*, ſuggeſting a *Devaſtavit* by *Charles*, of the Goods of *Benjamin*; and ſo by the Statute 30 *Car.* 2. Cap. 7. *Daniel*, the now Defendant, became liable, as if *Charles*, his Teſtator, had been living. The Defendant, *Daniel*, pleaded *Plene Adminiſtravit*; and all this Matter being found ſpecially, and that *Charles* who had *waſted, &c.* was indebted to the Defendant, *Daniel*, in a Debt upon Simple Contract. The Queſtion was, Whether he might retain for ſuch Debt againſt the Debt of the Plaintiff, founded on a *Devaſtavit*; and adjudged, that he might, becauſe 'tis not a Debt of ſuperior Nature to a Debt on a ſimple Contract.

Bacon *verſus* Weſton, Winch. 70

Debt againſt an Adminiſtrator of *R. B.* who pleaded, that the ſaid *R. B.* acknowledg'd a Judgment to him; and that he retain'd ſo much of his Goods to ſatisfy himſelf; and that he had not Aſſets *ultra* 40 *s.* to ſatisfy the ſame. It was objected,

That

That this ought to be given in Evidence upon the general Iſſue; but adjudged, That he might do either.

But in theſe Caſes where an Adminiſtrator pleads, that Adminiſtration was granted to him, and that he retain'd to ſatisfy himſelf, he muſt ſhew by whom the Adminiſtration was granted; for otherwiſe he hath no Colour to retain. Caverly *verſus* Elliſon, T. Jones 23

An Executor *de ſon Tort* cannot retain, becauſe he hath no Title but by his wrongful Act.

Such an Executor died inteſtate, his Mother adminiſter'd, and afterwards marry'd; the Huſband paid the ſaid Inteſtate's Debts; and adjudg'd, That he might retain to the Value. Baker *verſus* Berisford, 1 Sid. 76. 1 Lev. 154.

Serjeant *Levinz* reports this Caſe in a different Manner, *viz.* Leſſee for 30 Years died inteſtate, his Adminiſtrator made a Leaſe for 20 Years, rendring Rent, and afterwards died inteſtate, and the Adminiſtrator of the Adminiſtrator brought an Action of Debt for the Rent, and entitled himſelf to the Term; for that the firſt Adminiſtrator had paid Debts of the firſt Inteſtate, to the Value of the Term, but did ſay *of his own Money*; for probably it might be of the Inteſtate's Money: But having declar'd, That he took the Term in Satisfaction of the Debts he had paid, it was a ſtrong Implication that he had paid them with his own Money.

Reverſion.

THIS is when the Eſtate which was granted for a Time, doth ceaſe and determine in the Perſon of the Grantee or his Heirs, and returns to the Poſſeſſion of the Donor, his Heirs, or Aſſigns, from whence it was at firſt deriv'd, and it paſſeth by thoſe Words, *viz. Lands, Reſt, remaining Part, Hereditaments, &c.*

34 H. 6. 6. Fitz Deviſe 4.

Firſt therefore, by a Deviſe of all his *Lands*, *Tenements*, Rents, and Services; it was adjudg'd, that the *Reverſion* will paſs, either by the Name of *Tenements*, or by the Name of *Lands*.

Townſend *verſus* Wales, 2 And. 59. Moor 341. Cro. Eliz. 524. Owen 155.

So where a Man was ſeiz'd in Fee of Lands in Poſſeſſion, and of other Lands in Reverſion after an Eſtate for Life, and he deviſed *all his Lands* to his Executors for ten Years for Payment of his Debts; adjudg'd, That by the Words *all his Lands*, the *Reverſion* as well as the *Poſſeſſion* paſs'd, eſpecially if the Lands in Poſſeſſion would not pay his Debts. The ſame Caſe is reported by Juſtice *Croke* by another Name, but 'tis the ſame in Effect, and it was upon the Deviſe of one *Smith*; and ſo was the Caſe of *Townſhend*, as reported by my Lord *Anderſon*.

Haws *verſus* Coney, Cro. Eliz. 159. 1 Leon. 180.

Deviſe of a Mannor to *R. B.* for ſix Years, and Part of other Lands to *W. N.* and his Heirs, and the *reſt* of all his Lands to his Brother, and to the Heirs of his Body; adjudg'd, That the Word *Reſt* did not only extend to the *Lands* which were deviſed before, but to the *Reverſion* in Fee of the Mannor, after the Determination of the Eſtate for Years.

Wheeler *verſus* Walcond, Allen 28.

So where the Teſtator was ſeis'd in Fee, and had three Grandchildren, and gave to each of them diſtinct Parcels of Land ſeparately, and to the Heirs Males of their Bodies, and all the *reſt and remaining Part* of his Eſtate, he deviſed to his three Grandchildren equally to be divided, *except* what he had given to them, and the Heirs of their Bodies. The youngeſt dy'd without Iſſue; adjudg'd, That by the Words *reſt and the remaining Part of the Eſtate*, the Reverſion in Fee would have paſs'd; but by Reaſon of the *Exception*, it did not paſs to the Grandchildren.

Hyley *verſus* Hyley, 3 Mod. 228.

So

So a Deviſe of all his Lands, Tenements, and *Hereditaments* undiſpos'd; it was held, That by the Word *Hereditaments* the *Reverſion* in Fee paſs'd. Lydcott *verſus* Willows, 3 Mod. 229 2 Vent. 285

The Teſtator had a Son and Daughter, which Daughter had two Daughters, and dy'd, to whom the Teſtator devis'd Annuities during their Lives; and then he deviſed that certain Perſons ſhould take the Profits of his Lands till his Son came of the Age of 24 Years, provided, *that if he die without Iſſue*, then the Lands ſhall go to *the right Heirs Males of the* Teſtator of his Poſterity and Name for ever. The Teſtator dy'd; his Son dy'd without Iſſue; his Nieces enter'd as Heirs, and the Brother of the Teſtator enter'd on them; adjudg'd, That by the Words *if he die without Iſſue*, the Son was Tenant in Tail; and then the Limitation *to the right Heirs Males* of the Teſtator, will be but a *Reverſion* expectant upon the Determination of the Eſtate Tail, and veſt immediately in the Son by Way of Deſcent; and if ſo, then the Reverſion in Fee being in him, it muſt neceſſarily deſcend to his Nieces, who are his Heirs at Law, and not to his Uncle. Counden *verſus* Clerke. Hob. 30.

Revocation.

BEFORE the 29 *Car.* 2. the Teſtator might revoke his *written Will* by any *verbal Declaration* of his Intent that it ſhould be revok'd, as if he had ſaid, that his Will formerly made ſhall be revok'd, or ſhall not ſtand, for it was always in his Power to revoke it during Life; and therefore a Will is ſaid to be *Ambulatory, uſque ad extremum vitæ exitum.* See *Marriage* 340.

The Teſtator made his Will, and about 10 Days afterwards, and ſix Days before his Death, he made a Feoffment to *A.* and *B.* to the Uſe of himſelf Dyer 74. Bourchier's *Caſe.*

himſelf for Life, Remainder to *H. B.* who was his Baſtard Son, and the Heirs of his Body, Remainder to his own right Heirs; adjudg'd, That this was a Revocation of his Will, becauſe a Will cannot take Effect till after the Death of the Teſtator.

The Word *Revocation* is a Term uſed in the Civil Law, by which Law, if the Teſtator did voluntarily ſell or diſpoſe the Thing deviſed, this was an actual Revocation of the Deviſe, becauſe he is preſum'd not to trouble his Executor to redeem it.

As to *Parole Revocations* before the Statute, (for ſince they are not good) we have many Inſtances in our Books.

Gibſon *verſus* Platleſs, Owen 76. Goldſ. 32. Godb. 133. Dyer 314.

ſſ. A Deviſe of his *Lands* to *R. B.* in Fee; then he made a *Feoffment* of the *ſame Lands* with a Letter of Attorney to make Livery; but before he executed the Feoffment, he aſk'd, Whether *it would hurt his Will?* And being anſwer'd no; he reply'd, *If this will not hurt my Will, I will ſeal it*, which he did; afterwards Livery and Seiſin was made on Part of the Lands, but not on the *Lands deviſed*; this was adjudg'd no Revocation by the Teſtator, becauſe of thoſe Words which paſs'd at the Time of the Execution of the Feoffment, but 'tis a Revocation in Law of that Part of the Land on which the Livery was made.

Simpſon *verſus* Kicher, 2 Cro. 115.

Deviſe of Land to *Anne Hide* and her Heirs; and afterwards the Teſtator lying on his Death-Bed, and becauſe ſhe did not viſit him, ſaid, *That Anne Hide ſhould not have any Part of his Lands or Goods*; this was likewiſe no Revocation, it was only a Diſcourſe without any Manner of Reference to the Will; for a Revocation ought to be by *expreſs Words* that he *doth revoke* the Will, or that ſhe ſhould not have the Land given by the Will, or the like.

Coward *verſus* Marſhall, Cro. Eliz. 721.

But

* But where the Teſtator made his Will, and afterwards declar'd, that his Will made at ſuch a Place ſhall not ſtand; though theſe are Words *in futuro* and not *in præſenti*, yet they ſhall not be taken futurely, becauſe they refer to a preſent Act; for *ſhall not ſtand* takes Effect preſently, and therefore 'tis a good Revocation. * Burton *verſus* Gomell, Cro. Eliz. 306.

'Tis true, about 24 Years afterwards there was a contrary Reſolution, *viz.* the Teſtator made his Will, and afterwards ſaid, *I have made my Will, but that ſhall not ſtand*; this was adjudg'd no Revocation, for 'tis what he intends to do, and not an abſolute Declaration of his Purpoſe to revoke it *in præſenti*. Cranvell *verſus* Sanders, 2 Cro. 497.

So where the Teſtator deviſed ſeveral Legacies to his Brothers by a *Will in Writing*, and ſix Years afterwards being ſick, was aſk'd to give Legacies to ſome other Relations, *he anſwer'd, He would not give or leave them any Thing.* This was ſet down in a Codicil, and prov'd with the Will; but adjudg'd, that it was not a Revocation of the Will as to the Legacies, becauſe there being a *formal Will* made in his Health, and no ſubſequent Diſcourſe either of that Will or the Legacies devis'd to his Brothers. Such an Anſwer to a doubtful Queſtion, ſhall not be a Revocation of a Will adviſedly made; for in ſuch Caſe, there muſt be plain and clear Words to revoke it, and this agrees with *Simpſon*'s Caſe. Eyre *verſus* Eyre, Cro. Car. 51.

Deviſe of Lands to *R. B.* in Fee, and afterwards he ſaid, that *W. N. ſhould be his Heir*, or that *W. N. ſhall have all I have*; if he ſpake the Words *Animo Teſtandi*, and that *W. N.* was his *Heir at Law*, this is a Revocation; but if he was not his *Heir*, 'tis otherwiſe. Ford's *Caſe*, 1 Sid. 73. *Sir William Rider's *Caſe*, Moor 874.

* The Teſtator made his Will, but before he *publiſh'd it*, he ſaid he would alter or add ſomething to it; if he die before ſuch Alteration, 'tis Brook *verſus* Ward, Dyer 310.

not

not his Will; but if he die after Publication, and before any Alteration, 'tis his Will.

But Revocations by Deed were always accounted the moſt effectual Way; and yet in ſuch Caſes there have been many Doubts and Queſtions.

1 Roll. Abr. 616. Deviſe of Lands to one in Fee, and afterwards the Teſtator deviſed the *ſame Lands* to *another for Years*; this is no Revocation of the Fee, but only for ſo many Years. And ſo my Lord *Rolls* tells us, it was agreed both by the Bench and Bar in *Montague* and *Jefferies's* Caſe, but I find no ſuch Thing there; the Caſe was thus:

Montague verſus Jefferies, Moor 429. *Sir John Jefferies*, Chief Baron, was ſeis'd in Fee in Poſſeſſion of the Mannor of *Maresfield* in *Suſſex*, and likewiſe of the Reverſion of *Grove-Lands*, and he deviſed both to one *Jefferies*; afterwards upon his Marriage with *Mary* the Daughter of one *Goring*, he *covenanted* with her Father to make a *Feoffment* of the Premiſſes, to the Uſe of himſelf and Wife for Life, which he made and executed by Livery on the *Mannor-Lands*, but not on *Grove-Land*; adjudg'd, that this *Feoffment* without Execution or Attornment of the Tenant of *Grove Land*, is a Revocation as well of that as of the *Mannor*, but if it had reſted only on the *Covenant*, and the *Feoffment* had not been actually made, it had not been a Revocation.

S. P. *adjudg'd in* Huſſey's *Caſe*, Moor 789. 1 Roll. Abr. 614.

Coke verſus Bullock, 2 Cro. 49. But if the Deviſe had *been to one* in Fee, and afterwards the Teſtator made a *Leaſe* to the *ſame Perſon* of the *ſame Lands*, to commence after his Death; adjudg'd, that this *Leaſe* was a Revocation of his Will, becauſe both theſe Eſtates could not ſtand together in the ſame Perſon.

Aſhley verſus Lavers, Goldſ. 93. Adjudg'd in Ejectment, that were the Teſtator had a Leaſe of Lands for *Term of Years*, and deviſ'd the ſame to another; and afterwards ſurrender'd

der'd this Leaſe, and took a new Leaſe, and dy'd, that the Deviſee ſhould not have the new Leaſe, becauſe the Surrender of the old Leaſe was a Revocation of the Deviſe as to that Leaſe.

Deviſe to his Wife for Life, then to his *eldeſt Son* in Tail, Remainder to his own right Heirs; then he made a *Leaſe of the ſame Lands* to his *youngeſt Son* for 30 Years, to commence after the Death of the Teſtator; adjudg'd, that though the Term was to begin at the ſame Time that the Deviſe of the Inheritance was to take Effect, yet it was not a Revocation of the Inheritance, but only for the Term; for they may both ſtand together in *different Perſons*, and there ſhall not be a Revocation, unleſs it had been expreſs'd; but it had been very clear if the *Term* had been to commence *immediately*, and before the Death of the Teſtator, it would have been no Revocation, becauſe it might have determin'd in his Life-time. Hodgkins *verſus* Whood, 2 Cro. 69. Cro. Car. 23.

Covenant to levy a Fine to the Uſe of ſuch Perſon as he ſhould name in his Will; then he deviſed the Lands to certain Perſons, and afterwards levy'd a *Fine*; this is a Revocation, though the *Fine* was levy'd in Purſuance of the *Covenant*, becauſe the Land could not paſs by *Relation* from the Time of the Covenant made, but from the Time of the *Fine* levy'd, for the Covenant and Fine make but one Conveyance. Lutwitch *verſus* Mitton, 1 Roll. Abr. 614.

Tenant in Common deviſed his Land which he had in Common, and afterwards made *Partition*; this is a Revocation. L'eſtrange *verſus* Temple, 1 Sid. 90. Raim. 240.

The Teſtator deviſed his Lands *in Fee*, and afterwards mortgag'd the ſame Lands for a * *Term of Years*, and dy'd. The Queſtion was, Who ſhould redeem, either the *Deviſee* or the *Heir at Law?* It was inſiſted for the *Heir*, that the *Mortgage* was a * Barber *verſus* Took, 1 Ch. Rep. 193.

Revocation

Revocation of the Will; but it was the better Opinion, that it was only a Revocation *pro tanto*, but not *pro toto*, and that by the Deviſe the Reverſion in Fee paſs'd, and by Conſequence the Equity of Redemption was in the *Deviſee*.

Frenche's *Caſe*, 1 Roll. Abr. 614.

Deviſe of Lands to one, and afterwards he deviſed the ſame the Lands to the *Poor of the Pariſh of* H. this is void, becauſe as ſuch they are not capable to take by a Deviſe, yet this *void Deviſe* is a *Revocation* of the Will.

1 Roll. Abr. 615.

So if the Teſtator deviſe Lands to one by a *Will in Writing*, and afterwards deviſe the ſame Lands to another by *Parole*; though this is void, yet 'tis a Revocation of the firſt Will.

Seymor *verſus* Noſworthy, Hardres 374. Hitchins *verſus* Baſſet's *Caſes in Parliament* 147. 3 Mod. 203 1 Shore 537. 2 Salk. 592.

Sir *Henry Killigrew*, *Anno* 1644, made a Will of *Land in Writing*, and the Jury found that in the next Year he made another Will in Writing, but that he did not deviſe any Lands thereby; it was objected, that this was a void finding, for it was in the Negative and ſuperfluous, and that the Court muſt intend that Lands were devis'd by the laſt Will, becauſe it was *in Writing*, and therefore it ſhall be a Revocation of the firſt; but adjudg'd, it was not; for a Revocation muſt be taken according to the ſubject Matter, that is, where the laſt Will doth not conſiſt with the former 'tis a Revocation, otherwiſe not; for there muſt be *animus revocandi* to make an effectual Revocation, as well as *animus teſtandi* to make a good Will; and ſince a Man may have ſeveral Wills of ſeveral Lands in different Counties, it doth not follow that the firſt ſhall be revok'd by the laſt, for it may not only conſiſt with the firſt, but confirm it; and where the Matter ſtands indifferent, the Court will not ſuppoſe a Revocation of a Will in Writing ſolemnly made, and appearing by a ſubſequent Will which doth not appear.

Revocations being thus uncertain both by *Parole* and by *Deed*, it was thought requiſite to make ſome Alteration in the Law as to this Matter by the Statute 29 *Car.* 2. *cap.* 3. by which it is enacted, *That a Deviſe in Writing ſhall not be revokeable, otherwiſe than* by ſome other Will or Writing *declaring the ſame, or burning, tearing, or cancelling it by the Teſtator*, or in his Preſence, *and by his Direction; but all Deviſes ſhall remain good, till alter'd or revok'd by ſome other Will* or Writing of the Deviſor, ſign'd in the Preſence of three Witneſſes declaring the ſame.

And ſeveral Queſtions have been made ſince the Statute, what ſhall be a Revocation, what not.

ſſ. The Teſtator made a Will, which was duly executed, and intending to revoke it *in Part*, he directed theſe Words to be written under the ſame Will, *viz. We whoſe Names are ſubſcrib'd do teſtify, That* Edward King *did on the Day of the Date hereof publiſh and declare, that the ſeveral Clauſes and Deviſes in his Will in Writing, relating to his Daughter* Diana *ſhould ceaſe and be void.* The Words were written accordingly, and the Witneſſes Names were ſubſcrib'd in the *ſame Will and Paper*, when the Statute requires it ſhould be by ſome *other Will in Writing*, but the Teſtator's Name was not ſubſcrib'd to this *Revocation*; yet it was adjudg'd good, becauſe the Teſtator's Intent appeared plainly in *Writing* to revoke, and his *ſubſcribing* his Name to the Will ſhall ſerve for the whole; for 'tis not material, whether it is *ſigned* either at the Top or at the Bottom of the Will, for the Word is not *ſubſcribed* but *ſigned*, and if 'tis *ſigned* in any Place by the Teſtator, that is ſufficient: But afterwards it was held, That the *Revocation*, as well as the *Will*, muſt be *ſigned* by the Teſtator.

Hilton verſus King, 3 Lev. 86.

In

In the laſt Caſe, there was a Defect in the Teſtator's not *ſigning* the *Revocation*, in the next there was a Defect in the *Number of Witneſſes* in whoſe Preſence 'tis requir'd to be *ſigned*, and thoſe are *Three*.

Sayle *verſus* Freeland, 2Vent. 350

ſſ. A Settlement was made with a Power of *Revocation* by any Writing, publiſh'd under his Hand and Seal in the Preſence of *three Witneſſes*, he made his Will reciting his Power, and declared that he *revoked* the Settlement, but the Will had but *two Witneſſes*. My Lord Chancellor decreed this to be a good Execution of his Power, and that Equity would relieve in this *Circumſtance*, eſpecially where the Owner of the Eſtate had fully declar'd his Intention; for where a Power is reſerv'd for a Man to diſpoſe his own Eſtate, it ſhall have a favourable Conſtruction. But it ſhall be ſtrictly taken, where 'tis to charge the Eſtate of a third Perſon.

In the next Caſe, there was a Defect *in the Manner of the Witneſſes ſubſcribing the Will*; for it was not *in the Preſence of the Teſtator*, as requir'd by the Statute.

Eccleſton *verſus* Speke, 1Shore 89. 3Mod. 259

ſſ. The Teſtator made a Will in Writing according to the Statute, by which he deviſed his Lands, *&c.* and afterwards by another Will he devis'd the Lands to the ſame Perſon; but this laſt Will was defective in *the Manner of Subſcription*; for the Witneſſes did not ſubſcribe their Names in the Preſence of the Teſtator. Now though this was a *void Will*, yet it was inſiſted that it was a *good Revocation* of the firſt Will; for the Words of the Statute are, that a Will ſhall not be revok'd, but by ſome other Will or Codicil in Writing, *or other Writing declaring the ſame.* Now this was another *Writing* though not a Will; but adjudg'd, that it was not a *Writing* within the meaning of the Act; for that muſt be a *Writing operating*

operating as a Will, or writing *declaring* his Intention to make the firſt Will void.

So where the *Teſtator* made *two Wills*, but did not *ſign* the laſt in the Preſence of three Witneſſes; the Queſtion was, Whether it was a Revocation of the Firſt? As for Inſtance, he made one Will before, and another Will after the Statute, by which *he revoked all former Wills*, the laſt was atteſted by three Witneſſes in his Preſence; but it was not *ſign'd by the Teſtator in their Preſence*, which is one of the Circumſtances requir'd by the Act to make a good Will; then the Clauſe relating to Revocations is, *That no Deviſe of Lands ſhall be revok'd, otherwiſe than by ſome Codicil in Writing, or other Will or Writing declaring the ſame*; but ſuch Deviſes ſhall be good until alter'd by ſome other Will or *Writing of the Deviſor, ſign'd in the Preſence of three Witneſſes.* Now, if this conſtru'd as an entire Sentence, and not *disjunctively*, then the Teſtator muſt ſign a *Writing in the Preſence of three Witneſſes* to revoke the firſt Will; and this was not ſign'd by him in that Manner, and therefore did not revoke it. And of that Opinion was one of the Judges, but the other two were againſt him, *viz.* that the Sentence ſhall be taken *disjunctively*, and then here was another Writing declaring a Revocation of the firſt Will, which by the firſt Part of the Sentence, is not requir'd to be ſign'd in the Preſence of three Witneſſes, but only that a Deviſe ſhall not be revok'd, *but by ſome other Writing declaring the ſame*; which implies, that if there is ſuch a Writing, then it may be revok'd, and here was ſuch a Writing, therefore 'tis a Revocation. And this differs from the Caſe of *Eccleſton* and *Speke*; for though in both Caſes the ſecond Wills *were void, viz.* in *Speke*'s Caſe, *becauſe the Witneſſes did not ſubſcribe their Names in the Preſence of the Teſtator*,

Holle verſus Clarke, 3 Mod. 218.

Teſtator, and in this Caſe, *becauſe he did not ſubſcribe his Name in their Preſence*, and therefore could not properly be call'd Wills but *Writings*. Yet they differ in this, for in *Speke*'s Caſe there was no *Declaration of his Intention to make the firſt Will void*; but in this Caſe he *did revoke all former Wills by him made*, and ſo it was *a Writing declaring the ſame to be revok'd*.

Diſter *verſus* Diſter, 3 Lev. 108.

Tenant in Tail made his Will, which was duly executed according to the Statute; afterwards he made a *Bargain and Sale* to make a Tenant to the *Præcipe*, and ſuffer'd a common Recovery, and declar'd the Uſes to himſelf in Fee. This was adjudg'd a Revocation, for by theſe Conveyances the Eſtate was wholly alter'd ſince he made the Will.

Guy *verſus* Dormer, Raim. 295.

The Teſtator made a Settlement of his Lands, with a Power of Revocation by any *Writing in expreſs Words*, declaring his Intention to revoke it. Afterwards he devis'd the Lands to his Nephew *William Dormer* and his Heirs, having by the Settlement given it to *Robert*. It was objected, that the Will did not revoke the Deed, becauſe 'tis only one implicit Revocation, when by the Power reſerv'd it muſt be by expreſs Words: But adjudg'd, that where two Acts cannot conſiſt as in this Caſe, the Deed having given the Lands to *Robert*, and the Will to *William Dormer*, the laſt muſt be a Revocation of the firſt, and ſo the Power well executed.

Brown *verſus* Wentworth, Yel. 92.

It hath been a Queſtion in what *Court* a *Revocation* ſhall be *tried*, as where an Adminiſtrator ſued for a Legacy in the *Spiritual Court*, and the Defendant pleaded that the Teſtator had revok'd the Will. It was inſiſted, that the Revocation or not, ſhall be try'd in that *Court*, becauſe the Will was the *Principal* of which they had Cognizance, and this was a *Dependent*: But adjudg'd to

the

the contrary, becauſe the Revocation is a meer temporal Act, and in no Sort depending on the Will, for it deſtroys it.

In Ejectment at the *Exchequer* Bar, the Caſe was, *Temple and two* more were Tenants in Fee in Common of the Mannor of *Burton*, and being ſo ſeis'd, *Temple* deviſed his third Part to *W. R.* and afterwards Partition was made between theſe three Tenants in Common by Indenture and Fine; and the Queſtion was, Whether the Will was revok'd by this Partition; and adjudg'd that it was not. *Riſley verſus Lady Baltinglaſſe*, Raim. 240

The Teſtator being a ſingle Man, devis'd all his perſonal Eſtate to *W. R.* afterwards he marry'd, and had ſeveral Children, and dy'd without making any other Will. It was decreed by the Delegates, that there being ſuch an Alteration of his Eſtate and Circumſtances ſo widely different from the Time of making his Will to his Death, that there was Room to preſume a Revocation, and that he did not continue of the ſame Mind when he dy'd. *Lugg verſus Lugg*, 2 Salk. 592.

Sale of Lands by Executor.

See *Tit. Aſſets, ante* 98.

WHere the Teſtator gives another Power to *ſell* his Lands, he may ſell the *Inheritance*, becauſe he gives him the ſame Power he had himſelf; and in ſuch Caſe the Purchaſer ſhall be in by the Will. And ſo was *Iſabell Goodcheap*'s Caſe, cited in Sir *Hugh Cholmly*'s Caſe, *viz.* Houſes in *London* were held of the King in Tail, the Tenant devis'd them to *R. B.* and if he dy'd without Iſſue, that then they ſhould be ſold by his Executors, *&c.* the ſaid *R. B.* dy'd without Iſſue. Now though the Houſes were eſcheated to the 1 Mod. 190. 2 Rep. 53.

King, yet a Sale made by the Executors is good, for the Vendee is in by the Will of the Teſtator, paramount the Eſcheat.

3 Leon. 119. So a Deviſe *that his Executors ſhall ſell, &c.* they levy a Fine, and ſold it, the Conuſee claiming by Virtue of that Title; it was pleaded, that *Partes finis nihil habuerunt.* But adjudg'd (againſt the Opinion of *Anderſon*) That upon Not-guilty pleaded, he might give the ſpecial Matter in Evidence, and that he ſhall be in by the *Deviſe*, and not by the *Fine.*

Beal *verſus* Sheppard, 2 Cro. 195. So a Deviſe of a *Copyhold* to his Wife, and if ſhe hath Iſſue by the Teſtator, then to ſuch Iſſue at 21; and if no Iſſue, then ſhe to chuſe two Attornies, and *make a Bill of Sale* the Land to her beſt Advantage. Adjudg'd, That this was an *Authority* to name the Attornies who ſhould ſell, and they might ſell accordingly; and when ſold, the Vendee ſhall be in by the *Will*, without any new Surrender.

Dyer 177. 2 Eliz. *Ceſtui que Uſe* before the Statute 27 *H.* 8. deviſed, that *W. R.* and *D. D.* his Feoffees ſhould ſuffer his Wife to take the Profits, *&c.* for her Life; and that after her Deceaſe the *Premiſes ſhall be ſold by the ſaid Feoffees*, and that they pay the Money ariſing by the Sale to ſuch Perſons, *&c.* The Teſtator *died*, and one of the Feoffees *died.* Adjudg'd, That the Survivor could not ſell, becauſe they were both nam'd by their proper Names in the Will. It would have been otherwiſe, if the Deviſe had been generally for them to ſell without naming them by their proper Names.

19 H. 8. 4. 9 Where the Teſtator appoints by his Will, that *B.* and *C.* ſhall *ſell* his Lands, and makes them *Executors*; in ſuch Caſe, if they refuſe the Executorſhip, yet they may *ſell*, becauſe they are appointed

ted by their *proper Names*; but if they had not been nam'd by particular Names, the Sale had been good. As for Inſtance, a Man devis'd, that his *Sons in Law* ſhould ſell his Lands, without mentioning their *Names*; one of them died, the *Survivor* may ſell. Lee *verſus* Vincent, Cro. Eliz. 26.

‖ So if the Deviſe had been to *four Perſons*, to the Intent that they ſell the Lands, and the Teſtator made them all Joint-Executors, and died; then one of them *refuſed*: It was adjudged, That the reſt might ſell. Moor 147. 1 Leon. 286. 3 Leon. 106. 1 And. 145 1 Roll. Ab. 666.

I admit this was a Doubt at Common Law, becauſe it was a Truſt repos'd in all of them; but if two of them had *died*, the Survivor might ſell, becauſe this was the Act of God, which ſhall prejudice no Man. ‖ Bonifault *verſus* Greenfield, Cro. Eliz. 80. 1 Leon. 60. Goldſ. 4. Godb. 77.

To remedy this Inconvenience, the Statute 21 *H.* 8. *cap.* 4. was made, by which it was enacted, *That thoſe Executors who take upon them the Probate of the Will, may ſell the Land devis'd by the Teſtator to be ſold, though the other refuſe, and will not join with them, and that ſuch Sale ſhall be good.* But they cannot ſell it to the Executor who refuſed, becauſe he is a Party to the Will, and may take upon him the Executorſhip when he will. Keilw. 207. 1 And. 27.

And even before this Statute, if all the Executors had *refuſed* to ſell, the Heir ſhall recover the Land. As where the Teſtator deviſed his Lands to be ſold by his Executors, and the Money to be diſtributed, and died. Soon after his Death there was a Tender of the Purchaſe Money made to them, but not to the full Value; whereupon they refus'd, and kept the Lands in their Hands, and received the Profits for two Years, without diſtributing the ſame; and the Heir recover'd, becauſe the Executors refuſed to ſell upon a Tender of the 38 Aſſiſe 3. 39 Aſſiſe 17.

Money, and converted the Profits to their own Uſe.

Goldſ. 2. Dyer 219. Moor 62. If a Man *deviſes his Land to be ſold by his Executors, after the Death of* R. B. then one of them dies, and afterwards *R. B.* died, the ſurviving Executor may ſell alone, becauſe the Time of Sale was not come 'till after the Death of *R. B.*

But where a Deviſe was to his Wife for Life, then to his Son in Tail, and if he died without Iſſue, that the *Lands ſhould be ſold by his Executors*; the Wife died, then one of the Executors died, and then the Son died without Iſſue, and the ſurviving Executor ſold the Land. Adjudged, That the Sale was not good, for this was not an *Intereſt*, but an *Authority* to ſell which did not ſurvive; for the Lands were not *deviſed to his Executors to ſell*.

And where the Executors have only an *Authority to ſell*, and no *Intereſt* deviſed to them, the Lands ſhall deſcend to the Heir 'till ſold, as where the Deviſe was, that his *Executors ſhall ſell*; this gives them only an *Authority*. But if it had been *I deviſe my Lands to my Executors to be ſold*, this gives them an *Intereſt*, and the Freehold is in them, and doth not deſcend to the Heir 'till ſold, and the Profits ſhall not be Aſſets in their Hands in the mean time.

Keilw. 107. *b.* Co. Lit. 112. *b.* 113. *b.*

Therefore if a Man *deviſeth his Lands to two Executors to be ſold, and dieth*, then one of the Executors died; the Survivor may ſell, becauſe this is a *Truſt* coupled with an *Intereſt*, and 'tis not like a *Deviſe that his Executors ſhall ſell*; for that is an *Authority*, and no *Intereſt*, and an *Authority* muſt be ſtrictly purſu'd, which cannot be done in this Caſe, becauſe the Teſtator appointed two to ſell; he put his Truſt in them jointly, and there being but one living, that Authority is determin'd.

Lock verſus Loggin, 1 And. 145.

Dyer 177. Keilw. 43 *b.*

**A Deviſe of Lands to his Executors to be ſold by them*, or by one of them, he made three Executors and died; one of the Executors died, the Survivors may ſell; for it appears that the Teſtator's Intent was, that the Land ſhould be ſold. Juſtice *Croke*, who reports this Caſe, tells us, the Words were, *or by any of them*. Juſtice *Owen* and Serjeant *Moor* ſay it was, That *his Executors, or one of them, or the Executors of ſuch Executors, or any of them, ſhould ſell*; but all agreed, the Sale *by two* was good.

* Townsend *verſus* Wales, 2 And. 59. Owen 155 Cro. Eliz. 524. Moor 341. *by the Name of* How *verſus* Coney.

But by the later Authorities theſe Points are carried a little farther; for it hath been adjudg'd, That an Executor may ſell where he hath only an *Authority*, and no *Intereſt*. As for Inſtance;

A Deviſe to his Wife for Life, and after his Deceaſe *to be ſold by his Executors for Payment of his Debts* and Legacies, and he made two Executors, and died; then one of the Executors died, and afterwards the Wife died. Adjudg'd by three Juſtices, That the ſurviving Executor may ſell, tho' he had only an *Authority*, and no *Intereſt*.

Howell *verſus* Barnes, Barnes's *Caſe*, W. Jones 352. Cro. Car. 382.

But certainly this muſt be a Miſtake; for by ſuch a Deviſe an *Intereſt* paſſeth, and ſo are the Caſes following.

‖ A Deviſe of *Lands to be ſold by his Executors for Payment of Debts*, as in the Caſe laſt mention'd; this gives them an *Intereſt*, for the *Payment of Debts* is a good Conſideration; and when the Lands are † ſold, the Money in their Hands is Aſſets at Common-Law, to charge them in an Action of Debt; and if they refuſe to ‡ ſell, they may be compell'd by a Bill of Equity.

Barrington *verſus* Knight Hardres 419. † Dethick *verſus* Curwin, 1 Lev. 224. ‡ Burnell *verſus* Currant, Hardres 405.

And where the Deviſe was, That *the Lands ſhould be ſold by his Executors, and the Money to be for his younger Childrens Portions*, and the Executor died before the Sale; the Heir was decreed to ſell.

Garſole *verſus* Garſole 1 Ch. Rep. 35.

Woolen-ſtone *verſus* Long, 1 Ch. Rep. 32

Where Lands are deviſed to be ſold for *Payment of Debts and Legacies*, it was the conſtant Rule, that all Debts ſhould be paid in Proportion, except ſuch Debts which in their own Nature charge the Land; and if that was not ſufficient to pay all, then both *Legatees* and Debtees muſt loſe in Proportion, becauſe the Land was made liable to one as well as the other; and therefore *Debts upon Simple Contract* ſhall ſtand in Equality with *Debts upon Bonds*; for *Jure naturali*, they are both Debts alike. And where Conſcience is Judge, neither of them ſhall be preferr'd, and *Legacies* ſhall ſtand in equal Degree with ſuch Debts, becauſe it was the Will of the Owner to ſubject his Lands to the Payment of the Legacies: But ſince it hath been adjudg'd, That Debts ſhall be *fully* paid before Legacies.

Hixon *verſus* Wytham, 1 Ch. Rep. 248.

Whitton *verſus* Whitton, 1 Ch. Rep. 275.

* 1 Roll. Abr. 667. Co. Lit. 112.

Ceſtui que Uſe deviſed, That his * Wife *ſhould ſell his Land*, and made her Executrix and died, the Widow marry'd again, ſhe may ſell the Land to her Huſband, becauſe ſhe hath it in Right of another; therefore ſhe may execute this *Authority* without her Huſband, and he ſhall be in by the Will.

Dike *verſus* Ricks, Cro. Car. 335. W. Jones 327. 1 Roll. Abr. 667.

Deviſe to his Wife for Life, and if it ſhould fully appear to her, that his Goods and Chattels were not ſufficient to pay his Debts; that then ſhe *ſhould ſell all his Lands*, or ſo much thereof, which together with his Goods, might pay his Debts. This is a precedent Condition for the Sale of the Land, and the Performance of ſuch Conditions muſt be averr'd, otherwiſe the Deviſee hath no Authority to ſell; therefore ſhe muſt ſet forth the Debts, and the Value of the Goods, that the Court may judge whether the Condition is perform'd, otherwiſe ſhe had no Power to ſell.

Deviſe to his Wife for Life, and if ſhe die without Iſſue, that the Land *ſhall be ſold by his Executors*, with the Aſſent of *R. B.* and he made his Wife and another Joint-Executors, and dy'd; then *R. B.* dy'd. Adjudg'd, That the Executors could not ſell for want of ſufficient *Authority*. Dan *verſus* Annas, Dyer 219. 2 Brownl. 100.

Deviſe of his Mannor and Land to his Siſter in Fee, except his Mannor of *H.* which he appointed for Payment of Debts, and made two Executors, and dy'd; one of the Executors dy'd, and the Survivor ſold the Mannor. Adjudg'd, The Sale was good by the *Intent* of the Teſtator; for he did not intend the Reverſion ſhould deſcend to his Heir, but that his Executors ſhould ſell it for the Payment of his Debts Dyer 371.

It appears by this laſt Caſe, that the ſurviving *Executor* ſold the Lands, tho' he was not appointed by the Will; and the Reaſon is, becauſe the Lands were to be ſold *for Payment of Debts:* For in ſuch Caſe where no Perſon is appointed to ſell, the Executor muſt do it, and ſo it was rul'd many Years after. 1 Lev. 304.

But where the Money ariſing by the Sale is to be diſtributed among his Relations, or to any other Purpoſe than the *Payment of his Debts*, there the Heir muſt ſell, if no Body elſe is appointed: As for Inſtance;

William Shirley devis'd his Lands to his Wife for Life; and that after her Deceaſe the Reverſion ſhould be ſold, and the Money ſhould be *diſpos'd by her to ſeveral of her Relations*; and made her Executrix, and dy'd. She prov'd the Will of her Huſband, and made another Will, and appointed Executors, and dy'd. They exhibited a Bill againſt the *Coheirs of* Shirley, to compel them to ſell. It was inſiſted, that tho' here was no Perſon appointed to ſell, yet the Wife being left *Executrix*, and appointed Pitt *verſus* Pelham, T. Jones 25 1 Lev. 304. 1 Ch. Rep. 176.

pointed to distribute the Money, the Law will adjudge, that the Land must be sold by her; and she having not executed that Power, her Executors may lawfully sell. But adjudg'd, That tho' 'tis true, where Land is *devis'd to be sold for Payment of Debts*, and no Person appointed to sell, the Executor shall do it, because 'tis the Office and Duty of an Executor to pay the Debts of his Testator: And so 'tis where Lands are devis'd to be sold, and the Money appointed for any *charitable Use*: Yet an Executor of an Executor shall not sell, because 'tis only a bare *Authority* in the first Executor, which cannot be transferr'd to another; so the Bill was dismiss'd. But that Dismission was revers'd in the House of Peers by the Advice of the Judges, and the Co-heirs were decreed to sell; for when no Body is appointed by the Testator to sell, he must do it who hath the Estate, and that is the *Heir*.

2 Leon. 220. And with this agrees a former Resolution many Years before, (*viz.*) Devise of his Lands to his Wife for Life; and if he had no Issue by her, then after her Death *it should be sold*, (but did not say by whom) and the *Money distributed to three of his Blood*, and he made his Wife and another Joint-Executors, and dy'd. They prov'd the Will, and then one of them dy'd. Adjudg'd, That the Wife, who was the surviving Executor, might sell the Lands; for it was the plain *Intention* of the Testator, that his Executor should sell, because he had appointed them to distribute the Money.

Guilliams *versus* Rowell, Hardres 204. So upon a Bill in Equity the Case was, the Testator devis'd that his Lands should be sold by *W. R.* and *T. W.* for the Payment of his Debts and Legacies, and dy'd, leaving other Executors: One of the Trustees for the Sale of the Lands dy'd. It was decreed, that the Survivor and the Heir at Law

Law ſhould ſell, becauſe the Lands were ty'd with a Truſt, which will ſurvive in Equity.

It hath been a Queſtion in the Caſes before-mention'd, Whether the Legatees may ſue for their Legacies in the Spiritual Court, or not? And as to that Matter, my Lord *Coke* hath made a very nice Diſtinction, (*viz.*) That where *Lands are deviſed to be ſold by* R. B. and the Money to be *diſtributed* by him to particular Perſons; this is not within the Juriſdiction of the Spiritual Court, becauſe the Money is iſſuing out of the *Land*: But a Deviſe that *R. B.* ſhall ſell his Lands, and that the Money ſhall remain in his Hands to pay Legacies; this, he tells us, is teſtamentary, and triable in the Spiritual Court. Samborn *verſus* Samborn, 2 Bulſt. 257.

But 'tis otherwiſe adjudg'd, (*viz.*) That where the Deviſe was, that *R. B. ſhould ſell his Lands*, and ſhould *diſtribute* the Money to three Perſons equally; the Land was ſold, and one of the Legatees libell'd in the Spiritual Court for his Share. It was held, that this was not teſtamentary, or a Legacy, it being a *Sum ariſing out of Land*, and therefore not determinable in that Court, but in a Court of Equity; for 'tis a Truſt in the Deviſee for the Benefit of the Legatees. Edwards *verſus* Graves, Hob. 265.

Same Lands twice deviſed in one Will.

IT ſometimes happens that the ſame Lands are twice devis'd in one Will; and therefore it may be neceſſary to know what the Law is in ſuch Caſe.

ſſ. A Deviſe of *Land* to one, and of a *Rent* out of the ſame Land to another by the ſame Will; both theſe are good.

So

So a Deviſe to one *in Fee*, and in the ſame Will the ſame Lands are devis'd to another *for Life* or Years, both may ſtand.

3 Leon. 11. 2 Cro. 49. But if the Deviſe is of the ſame Lands to another *in Fee*, this makes them *Jointenants*.

Godolp. 449. And this agrees with the Civil Law; for if the Teſtator gives his Houſe *to one*, and in the ſame Will gives the ſame Houſe *to another*, they are *Joint-Legatees*; but if afterwards he give the Houſe to another by Deed, 'tis a Revocation of the Will, as to the Houſe. So likewiſe if the Houſe is pulled down, and a new one built, the Deviſe is void.

Co. Litt. 112. If there are ſeveral Deviſes of the ſame Thing in one Will, the laſt muſt take Place.

Wallop *verſus* Darby, Yel. 209. Brown Jarvais, 2 Cro. 290 A Deviſe of *all* his Land to *John in Tail*, and in the ſame Will *Part* of his Land is given to *R. B.* this is an Explanation of his Intent, (*viz.*) that *John* ſhall have *all*, except what he gave to *R. B.* who takes by Way of Remainder after the Death of *John*, without Iſſue: But 'tis otherwiſe if the Deviſe to *John* had been in *Fee*, becauſe a Fee-Simple cannot be limited upon a Fee.

Seal.

March. 206. *Sealing* is not eſſential to a Will; for all the Statutes which relate to making Wills do not mention it, but only that it muſt be in *Writing*.

Signing.

Signing is an eſſential Circumſtance to compleat a Will: 'Tis requir'd by the Statute 29 *Car.* 2. *cap.* 3. (*viz.*) *That all Bequeſts of Lands ſhall be in Writing, and ſigned by the Party deviſing, or by ſome other Perſon in his Preſence, and by his Direction.* And the

the Clauſe concerning Revocations is, *That a Will in Writing ſhall not be revok'd, but by ſome other Will or Codicil in Writing declaring the ſame; but ſhall remain in Force 'till alter'd by ſome other Will or Codicil in Writing, or other Writing of the Deviſor, ſigned in the Preſence of three Witneſſes declaring the ſame.*

Since the Statute this Caſe happen'd, *viz.* the Teſtator writ his Will with his own Hand, beginning as uſual, *In the Name of God, I* John Stanley, *do make this my laſt Will, &c.* which was duly executed in all other Circumſtances; but he did not *ſubſcribe* his Name to it. This was adjudg'd a good Will; for the Statute doth not direct where he ſhall ſign it, neither doth it ſay, he ſhall *ſubſcribe*, but *ſign*; therefore ſince his Name was in the Will, and written by himſelf, that was adjudg'd a ſufficient *Signing* within the Statute. Lemayn *verſus* Stanley, 3 Lev. 1.

And here it may not be improper to ſhew how the Law was taken, as to this Matter before the Statute; of which I ſhall only give an Inſtance or two, ſince 'tis now alter'd.

ſſ. A Will was written by a Lawyer, and publiſh'd by the Teſtator, but not *ſign'd* by him, being all in looſe Sheets; and this was adjudg'd to be a good Will. Stephens *verſus* Gerard, 1 Sid. 315.

Another Will was written by a Doctor of Phyſick, in theſe Words, the Teſtator being ill, (*viz.*) *The 20th Day* of June, 1663. Memorandum, *That* Samuel Bates *did declare and expreſs, that his Brother* John Bates *and his Heirs, ſhould be Heirs to his Land.* This was ſeal'd, but not *ſign'd* by the Teſtator, and adjudg'd a good Will. Dinne *verſus* Monday, 1 Sid. 362.

Super-

Superſtitious Uſe.

WHere Lands or Goods are deviſ'd for ever, to find or maintain an

1. *Anniverſary.*
2. *Chaplain.*
3. *Lamp in a Chapel.*
4. *Obit.*
5. *Prieſt to pray for the Soul of the Dead.*
6. *Stipendiary*, &c.

Theſe, and ſuch like, are Deviſes to ſuperſtitious Uſes, intended by the Statute 1 *Ed.* 6. *cap.* 14. and forfeited to the King; all which may be ſeen in the *fourth Report*, where many Caſes are cited, and ſeveral Reſolutions as follow:

Adams Lambert, 4 Rep. 114.

ſſ. Deviſe to his Kindred to pay certain Sums to *thoſe Uſes*, the King ſhall have all the Lands; but if 'tis limited, that his Kindred ſhall have the Reſidue of the Profits above the ſuperſtitious Uſe, 'tis otherwiſe.

As for Inſtance: If he gives 20 *l. per Ann.* to find a *Prieſt*, and appoints, that the Prieſt ſhall have *only* 10 *l. of it*, the whole goes to the King, becauſe it ſhall be intended, that the reſt ſhall be to find Neceſſaries for that Purpoſe: But if the Reſidue had been given to his *Kindred*, or *to the Poor*, there the King ſhall have but the 10 *l.* But where 'tis not expreſs'd how much the *Prieſt* ſhall have, the King ſhall have the whole.

Therefore if Lands are given generally to find a *Prieſt*, the King ſhall have all; but if the Prieſt is only to have a particular Stipend out of it, the King ſhall have that, and no more.

Where

Where a Sum certain is given to the Prieſt, and other Goods are given which depend on the ſuperſtitious Uſe, all is given to the King.

The Teſtator devis'd Houſes in *Wood-Street* in *London*, upon Condition, that out of the Profits the Deviſe find an *Obit*, and allow eleven Marks yearly to a *Chantry-Prieſt*, to maintain poor decay'd Men to pray for the Souls of *H.* 6. and his Heirs, and for the Souls of the Teſtator, and his Heirs and Anceſtors, and with the reſt of the Profits to repair the Houſe. Some would have the King entitled to the Whole, by Virtue of the Statute, becauſe all the Uſes were ſuperſtitious. It was clear for the *Obit* and *Chantry-Prieſt*, and then for the Maintenance of the poor decay'd Men, it was for a ſuperſtitious Purpoſe, (*viz.*) to pray for the Souls of the Dead; and if the Maintenance is ſuperſtitious, then to repair the Houſes which are inhabited by ſuch Perſons to do ſuperſtitious Acts, muſt be ſo likewiſe. But it was adjudg'd, That the King ſhall have no more than the Profits which were to be apply'd to ſuperſtitious Uſes; and that was for the *Obit* and the *Prieſt*; for the Maintenance of the Poor is a charitable Act, and they being order'd to pray for the *Souls of the Dead*, was, in thoſe Days, eſteem'd likewiſe charitable; and there is a Difference where certain Profits *out of Lands*, are given to ſuperſtitious Uſes, and where the *Land itſelf* is given, declaring, that the Profits (without ſaying how much) ſhall be imploy'd to thoſe Uſes; for, in the firſt Caſe, the King ſhall have only ſo much of the yearly Rent which is apply'd to the ſuperſtitious Uſe, but in the other Caſe he ſhall have the Land itſelf.

Skinners Company's Caſe, Moor 129.

Moor 265. 649.

So where the Teſtator devis'd two Houſes in *Walbrook*, *London*, to the Church-Wardens of St. *Stephen's* Church there, to find an *Obit* of 3 *l.* 4 *d.* yearly in that Church, and to repair the Houſes,

Hart verſus Brewer, Cro. Eliz. 449.

and

and to beſtow the Reſidue in repairing the Church, and to provide Ornaments thereof; and if they fail'd, then he deviſed the Houſes to the Lord Mayor. It was adjudg'd, that the King ſhould not have the whole, but that which was appointed for the Maintenance of the *Obit.*

Summons and Severance. See *ante* 166.

Tail by Deviſe.

Weſtm. 2. cap. 1. 13 Ed. 1.

BEfore the Statute *De donis conditionalibus* all Eſtates of Inheritance were Fee Simple at Common Law; but by that Statute the Inheritance was divided, and a particular Eſtate was created in the Donee, which is call'd an Eſtate *Tail*, becauſe it was *divided* from the Fee, the Reverſion whereof was to return to the Donor after the Eſtate Tail was determin'd.

French Taille: *Latin* Sectura.

There are two Sorts of Eſtate Tail, viz. General *and* Special.

An Eſtate *Tail general* is where Lands are given to a Man, and to the *Heirs of his Body* begotten: And becauſe 'tis limited to the *Heirs of his Body*, without mentioning *Males*, or *on what Woman to be begotten*, therefore if he hath ſeveral Wives, and hath Iſſue by all, 'tis poſſible that all of them may ſucceſſively inherit; for which Reaſon 'tis call'd an Eſtate *Tail general.*

An Eſtate in *ſpecial Tail* is where Lands are given to a Man and his Wife, and to the Heirs of their *two Bodies* to be begotten; and here none can inherit but the Iſſue between them, and therefore 'tis call'd an Eſtate in *Tail ſpecial.*

I ſhall not mention any Eſtates Tail which have been created by Deeds, but only ſuch as have been made by *Wills*, which are always more favour'd in Law than Deeds, and therefore if a Man deviſe Lands to another and *to his Heirs*, this

27 H. 8. 27.

hath

hath been adjudg'd to be an Eſtate Tail in a Will; but 'tis otherwiſe in a Deed, for there muſt be the Word *Body* to make ſuch an Eſtate.

So a Deviſe to a Man, and to the Heirs *Males* of his Body, who hath Iſſue a *Daughter*, who hath Iſſue a *Son*, he ſhall inherit; but 'tis otherwiſe by a Deed. Fitz. Deviſe 18. ante 305. *Vide* Co. Lit. 25. a.

And to ſhew that the Word *Heirs*, without the Word *Body*, will make an Eſtate Tail in a Will, I find theſe Caſes:

Deviſe to an Infant *in Ventre ſa mere & hæredibus ſuis* lawfully to be begotten; and the Teſtator devis'd ſome other Part of his Lands to his *Daughter*, and *to the Fruit of her Body*, and if ſhe dy'd without Fruit of her Body, Remainder to the ſaid Infant, and that *one ſhould be Heir to the other*. Adjudg'd, this was an Eſtate Tail in the after-born Child; for the Words *hæredibus ſuis* lawfully begotten, and that *one ſhall be Heir to the other*, make an Eſtate Tail in a Will without the Word *Body*. Church *verſus* Wyat, Moor 637.

Agreeable with this Caſe there was a late Judgment of the like Nature, *viz.* the Teſtator had three Daughters, *Suſan*, *Anne*, and *Elizabeth*, and devis'd his Lands to his Wife till his *Heir* came of Age, paying to his *Heir* 10 *l. per Annum*, and he devis'd to *Anne* and *Elizabeth* 140 *l.* apiece, and if *Suſan his Heir die without Heirs* before 21, ſo that the Lands ſhould come to *Anne*, then ſhe to pay the Portion to *Elizabeth*. Adjudg'd, that *Suſan* ſhould have all the Lands excluſive to her Siſters by the Word *Heir*, ſo often mention'd in the Will; but by the laſt Clauſe ſhe had only an *Eſtate Tail*. Trilly *verſus* Collier, 2 Lev. 162.

And the Reaſon is, becauſe in this and ſuch like Caſes the Word *Heirs* ſhall be intended *Heirs of the Body* of the Deviſee, for *Suſan* could not die without Heirs ſo long as her Siſters were living,

ing. And of this we have many Inſtances, which I ſhall mention in Order of Time as they were adjudg'd.

Webb *verſus* Herring, Mow. 873. Bridgm. 84 2Cro. 415. 3Bulſt. 193 1 Roll. Rep. 289. Cro. Car. 51. S. P. Litt. Rep. 346. S. P.

Deviſe of an Houſe to *Francis* his Son after the Death of the Wife, and if his *Daughter* ſurviv'd his Mother, and Brother *Francis* and *his Heirs*, then ſhe to enjoy the Houſe for Life, Remainder over. The Son dy'd *without Iſſue*, then the Mother dy'd. Adjudg'd, that *Francis* had an Eſtate Tail; for the Word *Heirs* here muſt be intended *Heirs of his Body*, becauſe the next Limitation was to his Siſter, who was his collateral Heir, and 'tis plain he could not die without Heirs as long as his Siſter liv'd.

1 Roll. Abr. 836.

The Teſtator had two Sons, and he devis'd his Lands to his youngeſt Son, and if he *died without Heirs*, then to his eldeſt Son in Fee; adjudg'd, that the youngeſt had an *Eſtate Tail*; for 'tis as if he had devis'd it to the youngeſt, and to the Heirs of his Body; for otherwiſe the Remainder to the eldeſt would have been void, becauſe the youngeſt can't die without *Heirs* ſo long as the eldeſt is living.

Dotton *verſus* Ingram, 2Cro. 427.

Deviſe to *John* his eldeſt Son and *his Heirs*, upon Condition that he ſhould grant to *Stephen and his Heirs* an Annuity of 4 *l.* and if *John died without Heirs of his Body*, Remainder over to *Stephen*. This is an Eſtate Tail to *John*, for by the ſubſequent Clauſe it appears what *Heirs* were intended by the Teſtator. 'Tis true, the Word *Body* explains his Meaning, but it had been the ſame if that Word had been left out; for the Word *Heirs* in the firſt Part of the Will ſhall be taken to be *Heirs of his Body*, becauſe the Law will rather preſume that he may die without Iſſue than without *Heirs*.

'Tis

'Tis true, in the Caſe of *Keen verſus Allen* three Judges were of Opinion, that where the Deviſe was to the Wife for Life, and afterwards to his Son *Thomas and his Heirs*; and for Default of *Heirs of Thomas*, Remainder to his Daughter and her Heirs, that *Thomas* had not an Eſtate Tail: And yet they held that the Word *Heirs* in the latter Clauſe of the Will did ſhew he meant *Heirs of his Body*, and that he could not die without Heirs ſo long as his Siſter was living; but they held likewiſe, that where an Eſtate Tail is created, it muſt be either by expreſs Words, *viz. Heirs of the Body*, or by Words which amount to it; and therefore a Deviſe to *R. B.* and his Heirs *iſſuing*, is an Eſtate Tail, becauſe the Word *Iſſuing* explains what Heirs were intended. Keen *verſus* Allen, Hearn *verſus* Allen, Lit. Rep. 4. Cro. Car. 57.

But this Opinion of thoſe three Judges is contrary to many ſolemn Judgments before-mention'd: And in that very Caſe *Croke* and *Telverton* held that it was an Eſtate Tail in *Thomas*; but if the *Remainder* had been limited to a *Stranger*, and not to the next Heir, it had been a Fee-ſimple in *Thomas*; and in ſuch Caſe the Remainder had been void, becauſe it had been a Limitation of one Fee upon another.

And ſo it hath been adjudg'd ſince that Time, *viz.* A Deviſe to *William Turner* for Life, and *to his Heirs*, and for want of *Heirs of him* to *George Turner* in like Manner, and for *want of Heirs of him* to *William Flint* and his Heirs for ever. *William* and *George Turner* dy'd without Iſſue. Adjudg'd, this was an Eſtate Tail in them, Remainder in Fee to *William Flint*, becauſe the Words *for want of Heirs* muſt be intended *Heirs of his Body*, eſpecially becauſe *William Flint* was their next Heir, ſo they could not die without Heirs as long as he or any of his Heirs were living, therefore it muſt be intended Heirs of his Body. Parker *verſus* Thacker, 3 Lev. 70.

Blaxton *verſus* Stone, 3 Mod. 123

So where the Deviſe was to his eldeſt Son, and if he dy'd without *Heirs Males*, then to his next Son in like Manner. This was held an Eſtate Tail in the eldeſt Son; for the Teſtator muſt intend *Heirs Males of his Body*, becauſe of the Deviſe over to his ſecond Son; for it would have gone to him of Courſe without ſuch Deviſe, if the eldeſt had dy'd without Iſſue.

Nottingham *verſus* Jennings, 1 Salk. 233

In Ejectment the Caſe was, the Father having three Sons, devis'd his Lands to his ſecond Son and his Heirs for ever, and for *want of ſuch Heirs*, then to the right Heirs of the Father. who dy'd, and his ſecond Son enter'd, and dy'd without Iſſue, living the eldeſt Son; adjudg'd, that the ſecond Son had but an Eſtate Tail, and that the Deviſe over by thoſe Words, *viz. And for want of ſuch Heirs*, is void in Point of Limitation; for the Intent of the Teſtator was, that the Lands ſhould deſcend from him, and not from his ſecond Son, becauſe the Words *for want of ſuch Heirs* can import no more than *want of ſuch Iſſue*; for the ſecond Son can never die without Heirs, ſo long as his Brothers or any Heirs of the Father are living, ſo that the eldeſt Son in this Caſe takes by Deſcent, and not by the Will.

Goldſ. 138

The Words *Heirs*, *Iſſue*, and *Body*, make an Eſtate Tail in Wills; as where the Teſtator devis'd his Lands to his Wife for Life, Remainder in Tail to his Son; and if he dy'd without Iſſue, Remainder to *W. R* and his Wife and *their Heirs*. 'Tis true, in this Caſe the Court was divided, whether the *Heirs* of *W. R.* had an Eſtate Tail, or only for Life.

Atkins *verſus* Atkins; Cro. Eliz. 248. Moor 593. S. C.

But where the Teſtator devis'd Lands to *W. R.* and *the Heirs of his Body*, and after his Deceaſe to *B. R.* the eldeſt Son of the ſaid *W. R.* and the Heirs of his Body, Remainder over. It was objected, that *W. R.* had only an Eſtate for Life; but

but adjudg'd, he had an Eſtate Tail, becauſe by the firſt Clauſe of the Will, an expreſs Eſtate Tail was devis'd to him, and there are no ſpecial Words following to alter that Eſtate.

In a ſpecial Verdict in Ejectment the Caſe was, the Father being ſeis'd in Fee and having a Wife and two Sons, devis'd his Lands to his Wife for Life, *if ſhe do not marry*; *but if ſhe do marry*, then *H.* (who was his eldeſt Son) ſhall enter preſently *after her Deceaſe*, and hold the Lands to him and the Heirs Males of his Body, Remainder to *R.* his other Son, and the Heirs Males of his Body, Remainder over, and dy'd. The Widow did not marry. The Plaintiff deriv'd a Title under a Grandaughter, who was the Heir general of *H.* the eldeſt Son of the Teſtator; the Defendant claim'd a Title as Heir Male of *R.* the ſecond Son, ſo that the Queſtion was, Whether an Eſtate Tail was created by this Will? For if it was, then the Defendant, who was Heir Male of *R.* had the better Title; adjudg'd, this was an Eſtate Tail; it appears that the Teſtator intended it ſo, by limiting ſeveral Remainders over, and rather than his Intention ſhall be defeated, the Words ſhall be thus *tranſpos'd*, *If my Wife marry, then* H. *ſhall enter preſently, if ſhe doth not marry, then he ſhall have the Lands to him and the Heirs Males of his Body*, Remainder over. Luxford *verſus* Cheek, 3 Lev. 129.

'Tis generally held, that the Word *Iſſue* maketh an Eſtate Tail, and that it amounts to the ſame Thing as the Words *Heirs of the Body*; as, a Deviſe to his Son and his Heirs, and if he die within Age, or *without Iſſue*, Remainder over. He dy'd within Age, but left Iſſue. It was adjudg'd, that he had an Eſtate Tail; for that Word ſhews what *Heirs* was to have it. Saul *verſus* Gerrard, Cro. Eliz. 525. Moor 422.

Robinſon *verſus* Miller, 1 Roll. Abr. 837. *cited in* Lane 57.

So a Deviſe to his Wife for Life, and afterwards to his Son, and if he *die without Iſſue, having no Son*, Remainder over. Adjudg'd, That the Son had an Eſtate Tail to the Heirs *Males* of his Body.

* Johnſon *verſus* Smart, 1 Roll. Abr. 836.

* So a Deviſe to two for their Lives, Remainder to their two Sons equally to be divided, and to their *Heirs*, and each to be *Heir* to the other, and if *they both* (naming them) *die without Iſſue*, Remainder over. This is an Eſtate Tail by the Limitation of the Remainder over upon their dying *without Iſſue*. But *Anno* 33 *Car.* 2. this Caſe was deny'd to be Law; for though my Lord *Rolls* mentions it in his Abridgment, 'tis not in his Reports either in that Year or Time; therefore 'tis probable it might be inſerted in his Abridgment not by himſelf, but by ſome other Reporter.

T. Jones 174.

King *verſus* Rumbull, 2 Cro. 448. 1 Roll. Abr. 833. 836.

A Deviſe to his three Daughters, equally to be divided; and if any of them die before the other, then the other to be *her Heirs*, equally to be divided; if they all die *without Iſſue*, Remainder over. This was adjudg'd an Eſtate Tail; for by the latter Clauſe of the Will, if they all *die without Iſſue*, it appears that the Teſtator intended by the Word *Heirs*, *viz.* it muſt be Heirs of their Bodies; for they could not die without other Heirs, ſo long as any of them were living.

Sparke *verſus* Purnell, Moor 864. Hob. 75.

So where the Teſtator was ſeis'd of Gavelkind Lands, and having three Sons, devis'd Part to one, Part to another, and the other Part to the third Son, and if any of them ſhould *die without Iſſue*, the other ſhould be his Heir. This was held to be an Eſtate Tail.

Wilſon *verſus* Dyſon, Raymond 425.

So a Deviſe of his Lands to his third Son *Gerard* and *his Heirs*, provided he pay unto *Elizabeth* 100*l.* within ſix Months after the Death of the Teſtator, and his Age of Twenty one Years; and for Default thereof to *Elizabeth and her Heirs*; and

and if *Gerard die without Iſſue*, the 100*l.* being paid, then the Remainder of his Eſtate to be divided amongſt his Sons and Daughters. *Gerard* dy'd before Twenty one, leaving Iſſue *Francis*, who dy'd before his Father could be Twenty one if he had liv'd, and the 100*l.* was not paid. Adjudg'd, this was an *Eſtate Tail* in *Gerard*, and not in Fee; and he dying without Iſſue, the Remainder is veſted in the reſt of the Sons and Daughters of the Teſtator, and not in the Heir at Law of *Gerard*.

The Teſtator had two Sons and a Daughter; and he devis'd his Lands to his Wife for ten Years, Remainder to his youngeſt Son and *his Heirs*, and if either of his Sons dy'd without *Iſſue of his Body*, then to his Daughter and her Heirs. The youngeſt Son dy'd without Iſſue in the Lifetime of his Father: The eldeſt had an Eſtate Tail. Rickman *verſus* Gardiner, Dyer 122.

So where the Deviſe was in the Words, *viz.* If it pleaſe God to take my Son *Richard* before he ſhall have *Iſſue of his Body*, ſo that the Lands deſcend to his Brother, *&c.* This is an Eſtate Tail in *Richard* by Implication. Coſen's *Caſe*, Owen 29. *See* Higgins *verſus* Mills *poſt.*

So where the Deviſe was to his Son *Thomas* and the Heirs Males of his Body for the Term of 500 Years, provided if he *or any of his Iſſues* Males alien the Premiſes, then he devis'd them over. Adjudg'd, this was an Eſtate Tail, and the Limitation for 500 Years void; for though generally a Deviſe to a Man, and to the Heirs of his Body for 1000 Years is a Term, and not an Inheritance, yet here the Teſtator's Intention was, that it ſhould be an Inheritance, becauſe by the *Proviſo* he took Care to advance the *Iſſue of Thomas*; but if it ſhould be a Term, then by the Deſcent of the Inheritance on *Thomas* that Term would be merg'd, and by Conſequence the *Iſſues* would be † Lovice *verſus* Goddard, Moor 772. 2 Cro. 61. 10Rep. 78. 1Rep. 175.

unprovided, for *Thomas* might alien the Eſtate from them.

In many of the Caſes before-mention'd it appears that the Words *dying without Iſſue*, or *dying without Iſſue of his Body*, make an Eſtate Tail; but there is a great Difference where the Limitation is upon a *dying without Iſſue generally*, and a dying without Iſſue in the *Life-time of another*, or before ſuch an Age. As for Inſtance;

Dyer 354. Deviſe to his Son and *his Heirs*, proviſo if *he die without Iſſue*, *living his Executors*, that then the Land ſhould be ſold by them. The Executors dy'd firſt. This was adjudg'd no Eſtate Tail.

Chadock *verſus* Cowley, 2 Cro. 695. So a Deviſe to one and his Heirs, and if *he die without Iſſue*, *living B.* or if he die before Twenty one, that then it ſhall remain to another: This makes a Fee-Simple conditional immediately, and the Words *if he dy'd without Iſſue* make an Eſtate Tail; but 'tis not to ariſe but upon a future Contingency when it ſhall happen.

Hanchett *verſus* Thelwell, 3 Mod. 104 And there is a Caſe where the Words *dying without Iſſue* doth not make an Eſtate Tail by Implication; as where the Deviſe was to his Son, (having two Sons) not ſaying how long, and if he die, then the Teſtator gave his Eſtate to his Daughters, Share and Share alike; and if all his Sons and Daughters *die without Iſſue*, then to *Anne Warren* and her Heirs. The Sons dy'd without Iſſue. Adjudg'd, this was no Eſtate Tail in the Daughters by Implication, but that they were Tenants in Common of the Inheritance; for this differs from *Gilbert* and *Witty*'s Caſe, where the Deviſe was to each of his Sons by a diſtinct and ſeparate Limitation, *viz.* one Houſe to one Son in Fee, another to the ſecond Son in like Manner, another to the third Son; proviſo, if *all* my Children die *without Iſſue*, then he devis'd the Houſes to his Wife. Two of them dy'd without

Iſſue.

Iſſue. Adjudg'd, That the Wife ſhould not ſtay to expect the Death of the third without Iſſue; for here was no Eſtate Tail to the Sons by Implication, becauſe the Deviſe was to them ſeverally by expreſs Limitation. But in this Caſe the Teſtator had two Sons, and nothing is expreſly devis'd to the ſecond, ſo that the Words [*if all his Sons and Daughters die without Iſſue*] are no more than a Deviſe to his *Iſſue*, which extends to them all, and gives only an Eſtate for Life.

But where there was an expreſs Eſtate devis'd to *Bernard for Life*, and after his Deceaſe to the *Iſſue of his Body* by a ſecond Wife, (he having a Wife then living.) It was inſiſted that *Bernard* took only an Eſtate for Life, with a contingent Remainder to his *Iſſue* by a ſecond Wife; as a Deviſe to Huſband and Wife for Life, and after their Deceaſe to *their Children*, they having a Son and a Daughter *at that Time*. This was adjudg'd an *Eſtate for Life* in them, with a Remainder to their *Children for Life*. And this was *Wilde*'s Caſe. Serjeant *Moor*, who reports the ſame Caſe, tells us, the Court of King's-Bench was divided; but my Lord *Coke* informs us, that it was argu'd before all the Judges, and adjudg'd as above-mention'd; but that it had been an Eſtate Tail if there had been no Children born when the Will was made, becauſe the Intention of the Teſtator was certain and manifeſt, that the *Children* ſhould take, not as immediate Deviſees, for they were not born, nor by Way of Remainder, for the Deviſe was to them immediately; ſo that the Word *Children*, where there are none *at that Time*, is a Word of *Limitation*, and amounts to the ſame Thing as if he had ſaid *Iſſue of the Body*, for every Child or *Iſſue* muſt be intended *Iſſue of the Body*. So a Deviſe to *Robert* for Life, and after his De-

King *verſus* Melling, 1 Vent. 214. 2 Lev. 58.

6 Rep. 16. Bendloes, T. 4 Eliz. 1 And. 43. Moor 397. poſt. 546.

ceaſe to the next Heir Male of his Body, and *to the Heirs Males of the Body of ſuch Heir Male. Robert* had only an Eſtate for Life; for the Addition of that Sentence excludes him from any Eſtate of Inheritance. And this was *Archer's* Caſe. They all agreed, if there had been no expreſs Eſtate limited to *Bernard for Life*, but it had been only to him and *his Iſſue*, which he ſhould have by a ſecond Wife, it had been an Eſtate Tail. On the other Side it was argued, that this was an Eſtate Tail; for the Word *Iſſue* is *nomen Collectivum*, and *ex vi Termini* takes in the whole Generation, and therefore is ſtronger than if it had been *Children*, and more comprehenſive than *Heirs of the Body*; as for Inſtance, the Teſtator having three Sons, *A*, *B*, *C*, deviſ'd his Lands to *B.* in Tail, and if he dy'd without Iſſue, then to his *own Children. B.* dy'd without Iſſue, and *A.* the eldeſt Son *had a Son*, and dy'd. Adjudg'd, that the *Son of A.* ſhould not take as one of the *Children* of the Teſtator; but in the principal Caſe it was adjudg'd only an Eſtate for Life in *Bernard.* And of that Opinion was my Lord *Hales*; but upon great Conſideration of the Caſe he chang'd his Opinion, and held it an Eſtate Tail; and thereupon a Writ of Error was brought in the *Exchequer* Chamber, and there it was held to be an Eſtate Tail.

Sonday's *Caſe*, 9 Rep. 127.

Deviſe of an Houſe to his Wife for Life, and after her Deceaſe to *William*; and if he marry and *have Iſſue Male*, then his Son to have it; and if he have *no Iſſue Male* lawfully begotten of his *Body*, then to *Samuel* in like Manner; and if any of his Sons, or their *Heirs Males Iſſue of their Bodies*, go about to alien the Houſe, then the next Heir to enjoy it. *William* ſuffer'd a Recovery to the Uſe of himſelf and his Heirs. Adjudg'd that he might

might, for he had an Eſtate Tail, becauſe theſe Words [If he die *without Iſſue Male*] do create ſuch an Eſtate, which in this Caſe is further explain'd by the ſubſequent Words, *viz.* if any of his Sons, or their Heirs Males Iſſue of their Bodies, go about *to alien, &c.* which they could not do if they had only an Eſtate for Life.

The Words *Heirs Males of the Bodies* make an Eſtate in Special Tail: As for Inſtance; Deviſe to his Wife for Life, Remainder to *Clement Frencham* and the *Heirs Males of his Body*, and if he die *without Iſſue*, but doth not ſay *Males*, then to his Couſin and his *Heirs Males*. *Clement* had Iſſue a *Daughter*, and dy'd. Adjudg'd, that this was not an Eſtate Tail general by the Word *Iſſue*, but ſpecial, *viz.* to the Heirs Males of his Body; and that the Condition [*If he die without Iſſue*] doth not alter the Eſtate Tail; for the firſt Words in the Will ſhew his Intent that it ſhould go to the *Males*, and therefore the *Daughter* had no Title. Frencham's *Caſe*, 1 And. 8. Dyer 171. Moor 13.

The Teſtator devis'd one third Part of his Land to his eldeſt Son in Fee, and the other *two Parts* to his four youngeſt Sons by Name, and to the *Heirs Males of their Bodies*; and if they *all* dy'd without *Iſſue Males* of their Bodies, then the ſaid *two Parts* ſhould remain to the right Heirs of the Teſtator. Three of the Sons dy'd without Iſſue. Adjudg'd, that the Survivor ſhall have an Eſtate Tail in all that *two Parts* which his three Brothers would have enjoy'd if they had been living, and had Iſſue, and not in his fourth Part alone. Dyer 303.

The Teſtator having Iſſue a Son and a Daughter, devis'd his Lands to his *Wife* for Life; and that when *Richard* his Brother ſhall come to the Age of Twenty five Years, then he ſhould have it to him and the *Heirs Males of his Body*. *Richard* Johnſon *verſus* Bellamy, 3 Leon. 211, 227.

chard before that Age levy'd a Fine in the Life-time of the *Wife*, though *Partes finis nil habuerunt*, becauſe of the Seiſin of the Wife for Life. Yet it was adjudg'd, that this Fine barred the Eſtate Tail.

Whiting *verſus* Wilſon, 1 Bulſt. 219 1 Roll. Abr. 834, 837.

Deviſe to *R. B. in perpetuum*, and after his Deceaſe, Remainder to his *Heir Male*, in the ſingular Number. This was adjudg'd an Eſtate Tail; for *Heir* is *nomen Collectivum*: 'Tis thus reported in *Bulſtrode*. But my Lord *Rolls* tells us, that the Remainder was limited to the *Heirs Males of his Body* for ever, which is a plain Eſtate in *Special Tail*.

Friend *verſus* Bouchier, 3 Mod. 81.

The Teſtator devis'd his Lands to *Dorothy Hopkins* for Life, Remainder to her firſt Son, and the *Heirs of the Body* of ſuch firſt Son, Remainder over. Then there was a *Memorandum* that his Will was, that *Dorothy Hopkins* ſhall not *alien* the Lands from the *Heirs Males of her Body*, but to remain for Default of ſuch Iſſue to *R. B.* Adjudg'd, that this *Memorandum* made no Alteration of the expreſs Limitation to the *Heirs of the Body*, ſo as to make it a ſpecial Eſtate in *Tail Male*.

Broughton *verſus* Langley, 1 Lutw. 823.

Deviſe of his Lands to *R. B.* and *W. N.* and their Heirs, that they, and the *Survivor of them* ſhould ſtand ſeis'd to the Uſes following, *viz.* To permit and ſuffer his Son *George Ramſden* to take the Rents during his Life, and after his Deceaſe to the Uſe of the *Heirs of the Body* of *George*, Remainder over, *&c.* provided, if *George* marry'd a Wife worth 100*l.* or more, that then the Truſtees ſhould have Power to make her a Jointure. It was inſiſted, that the Eſtate in Law was in the Truſtees as a Truſt for *George*, becauſe it was limited in them, and to the Survivor; beſides they had Power to make a Jointure, which they could not do if the Eſtate was not in them, ſo

that

that 'tis meerly a Truſt. But adjudg'd an Eſtate Tail in *George*; for a *Truſt* to permit a Man to receive the Profits, was an *Uſe* before the Statute 27 *H.* 8 *cap.* 10. for at Common Law there was no Difference between a *Truſt* and an *Uſe*, and therefore it muſt be executed in *George* by the Statute; and it cannot be otherwiſe, becauſe if the *Uſe* was not executed in him, then the Remainder limited to the *Heirs of his Body* could never take Effect by Way of Uſe executed, which of Neceſſity it muſt do, becauſe there is no Colour to make it a *Truſt* as *to them.*

Deviſe to his Wife for Life, Remainder to *Thomas* in Tail, Remainder to the right Heirs of *Thomas*: Alſo I bequeath to *Thomas* my Lands in *Springfield*, and my Lands in *Much-Baddow*: Alſo I give to *Thomas* my *Iſland* call'd *Owſey*, to have and to hold *all the laſt deviſed* Premiſes to *Thomas* in *Tail.* Adjudg'd, that he had an Eſtate Tail in *Springfield* and *Much-Baddow* as well as in *Owſey*; for the Limitation referr'd to all the Lands, of which there was no Eſtate limited before. Wiſeman *verſus* Rolfe, 1 And. 160 Owen 140. 1 Leon 57.

Juſtice *Owen*, who reports this Caſe, tells us, that *Owſey* was limited to the Seed of his Son *Thomas*, *Habendum all the deviſed Premiſes*, and doth not ſay *laſt deviſed* Premiſes to his Son, and the Heirs Males of his Body. Mr. *Leonard* reports it to be, *Habendum*, all the *laſt before devis'd* Premiſes unto *Thomas*, and the Heirs of his Body, and that it was adjudg'd the *Habendum* extended to all, and not to *Owſey* alone.

Deviſe to *John*, and to the *Heirs of his Body*: This was an Eſtate Tail. Serjeant *Moor*, who reports the ſame Caſe, tells us, the Teſtator added this Clauſe, *viz.* I will, after the Deceaſe of *John* (but did not ſay *without Heirs of his Body*) my Land ſhall remain to *George*, yet *John* had an Eſtate Tail. Atkins *verſus* Atkins, Cro. Eliz. 248. Moor 593.

Deviſe

Wild's *Caſe*, Richardſon *verſus* Yardly, 6 Rep. 16. Moor 397.

Deviſe to *A.* for Life, Remainder to *B.* in Tail, Remainder to *Rowland Wilde* and his Wife, and after their Death to *their Children.* The Court was divided whether this was an Eſtate Tail, or for Life; if it had been to them, and to the *Children of their Bodies*, it had been an Eſtate Tail. My Lord *Coke*, who reports this by the Name of *Wild's Caſe*, tells us it was adjudg'd an Eſtate for Life, becauſe the Huſband and Wife had *a Son and Daughter born, and living at the Time of the Deviſe*; and that if there had been *none then living*, it would have been an Eſtate Tail, becauſe it plainly appear'd that the Teſtator intended his Children ſhould take. And in ſuch Caſe they could not have it as immediate Deviſees, becauſe they were not then in Being; and they could not take by way of Remainder, becauſe it was an immediate Gift to them; therefore the Words muſt be taken as Words of *Limitation, viz.* as if it had been to the *Children or Iſſue of his Body.*

Champman's *Caſe*, Dyer 333.

Chapman had three Brothers; he devis'd one Houſe amongſt them, and another Houſe to his Brother *Thomas*, paying to *Chriſtopher* 3 *l.* 6 *s.* 8 *d.* to find him to School, or elſe to remain to his *Houſe*, provided that the Houſes *be not ſold, but go unto the next of the Name and Blood that are Males.* *Thomas* dy'd without Iſſue, the next Brother had Iſſue a *Son*, and dy'd. Adjudg'd, this was an Eſtate Tail in that *Son* as to the Houſe devis'd to *Thomas*, and likewiſe an Eſtate Tail to each of the Brothers of the other Houſe; for the Proviſo that they *ſhall not ſell* ſhews that he intended an Eſtate Tail.

That is, to his Family.

Tenant

Tenants in Common by Deviſe.

THE Words *equally, by equal Portions, equally to be divided, Share and Share alike,* and ſuch like Words, make a Tenancy in Common by Deviſe, of which I ſhall give theſe Inſtances following: See Life, Eſtate for Life, 416.

And firſt, the Word *equally* makes a Tenancy in Common; as a Deviſe to two *equally*, and to their Heirs, they are Tenants in Common, for otherwiſe the Word *equally* would be vain. And here 'tis plain the Teſtator intended that both they and *their Heirs* ſhould have an equal Advancement, which *their Heirs* could not have if this ſhould be a *Jointenancy*, for then the *Survivor* would have the whole. *Popham* agreed, that if the Word *equally* had been plac'd laſt, it would have been ſo. Lewen verſus Cox, Cro. Eliz. 443, 695. Moor 558.

So the Words *by equal Portions* make Tenants in Common, as a Deviſe of his Lands to his three Daughters in Tail; then follows this Clauſe, *viz.* I will that every of them ſhall be the others Heir *by equal Portions.* Theſe Words make them Tenants in Common. Fowler verſus Ongley, 1 And. 194.

Deviſe to his Wife for Life, Remainder to his three younger Children in Tail, *equally to be divided amongſt them all by equal Portions*; and if one of them die, then the other two which ſurvive ſhall be his next Heirs. Adjudg'd, that the three Brothers are Tenants in Common; for the Words *equally to be divided* muſt not be intended a Deviſion of the Poſſeſſion, but a Diviſion of their Title or Intereſt. Webſter's Caſe, 3 Leon. 19.

So a Deviſe to two, *equally to be divided*, or *Part and Part alike*, make a Tenancy in Common: And this is the fifth Reſolution in *Ratcliff*'s Caſe. Ratcliff's Caſe, 3 Rep. 39. B.

So

Thorogood *versus* Collins, Cro. Car. 75. Litt. Rep. 46. Hetley 29.

So a Deviſe to ſix Perſons, *Habendum* to them, and to their Heirs, and that all of them ſhould have *an equal and like Part, Part and Part alike*, and every of them as much as the other. Adjudg'd, that by the Words *Part and Part alike* they are Tenants in Common.

Newman *versus* Edwards, 1 Bulſt. 13

Deviſe of Lands to his two Sons, *to be equally and indifferently divided between them.* Adjudg'd, they are Tenants in Common for Life, for want of the Word *Heirs*; and that the eldeſt Son had a Fee-Simple in Poſſeſſion of one Moiety, and the Reverſion in Fee of the other Moiety.

Draper's *Caſe*, 1 Ch. Rep. 64.

The Teſtator devis'd *All* his Eſtate to his Executor, and to the *Survivor of them*, to the Intent that by the Sale thereof, and out of the Rents and Profits of his Office, the Leaſe whereof, and the Benefit and Proceed thereof, ſhould be for his Executors to pay his Debts; and when all is paid, that then the Leaſe of his Office ſhall remain to his Executors *Share and Share alike.* It was decreed, that though by the firſt Part of the Will the Executors are *Jointenants* of the whole Eſtate, yet by the laſt Clauſe they are Tenants in Common of the Leaſe.

Bliſſet *verſus* Canwell, 3 Lev. 373.

So a Deviſe of his Lands to his three Sons and their Heirs, and the *longeſt Liver of them*, to be *equally divided between them* after the Death of his Wife. Adjudg'd, that by the laſt Clauſe they are Tenants in Common, for the laſt Words in a Will controul the firſt; but take the whole Sentence together, then they are Jointenants during the Life of the Wife, and Tenants in Common after her Deceaſe.

See Brian *verſus* Cawſen, 327.

3 Mod. 209

The Teſtator devis'd to his Daughter, and to three of his Grandchildren, the Rents and Profits of his Mannor of *Spaine* for thirty Years, to hold by *equal Parts, viz.* his Daughter one Moiety, and his

his three Grandchildren the other Moiety; and if either of them die before the thirty Years expir'd, then the Term ſhould be for the Benefit of the Survivor. Adjudg'd, that there ſhould be no Survivorſhip here, becauſe the Words *equally to be divided* go to the Moieties, and make them Tenants in Common. See *King* verſus *Rumbull*. 2 Ante 538.

There is a Difference where a Man deviſes *all his Eſtate* to his Executors, as in *Draper's* Caſe before-mention'd. And where the Deviſe is of a *Term for Tears to his Executors, until his Debts and Legacies ſhould be paid, and all ſuch Charges as they ſhould be put unto by any Suit concerning the Will.* Adjudg'd, they ſhall not take this Term as Deviſees by Moieties, for that would make them Tenants in Common, but they ſhall take it as Executors. Serjeant *Moor*, who reports this Caſe, tells us, the Teſtator was ſeis'd of Lands in Fee, as well as poſſeſs'd of a Term for Years, and that he devis'd all his Lands as aforeſaid; and though the Executors did not take the Term as Deviſees, yet they had the Lands in Fee as ſuch, and ſo were Tenants in Common of thoſe Lands. Pannel *verſus* Ferne, Cro. Eliz. 347. Moor 350. Goldſ. 189

Deviſe to his Wife for Life, Remainder to three (naming them) and their Heirs *reſpectively*. This is a Tenancy in Common, for otherwiſe the Word *reſpectively* would be inſignificant; for if it ſhould be a *Jointenancy*, the Law ſays as much without the Word *reſpectively*, ſo that it muſt have ſome Meaning; and the proper Signification is to make a ſeveral Diſtinction of the Eſtate; for it relates to the *Eſtate*, and not to the *Perſons* of the Deviſees, or to the Survivor of them. Torret *verſus* Frampton, Stiles 434

But where a Surrender of a Copyhold was made to his three Sons, and to their *reſpective* Heirs, *equally to be divided*. This was held to be a *Jointenancy*, 5 Will. R.

nancy, becauſe a Surrender is a Conveyance at Common Law: It had been otherwiſe in a Will; for in ſuch Caſe thoſe Words would have made a *Tenancy in Common.*

So a Deviſe to his three Sons *Share and Share alike*, without the Words *equally to be divided*, amongſt them, make a Tenancy in Common.

The Nature of this Tenure is, that though ſeveral Perſons occupy in Common, and they hold *pro indiviſo*, and neither of them knoweth his ſeveral Part, (as in the Caſe of Jointenant) yet the Share of one dying doth not go to the Survivor, but to the Heirs, *&c.* of the Perſon ſo dying, if he doth not otherwiſe diſpoſe it by Grant or Will, which he may do as well as any other Land of which he is ſole ſeiſed.

And ſuch Tenants in Common by Deviſe may join, or ſever in an Action of Debt for Rent reſerv'd upon a Leaſe made by their Teſtator; but they cannot join in an Avowry, for that is an Action in the Reality.

Term for Years by Deviſe.

See *Chattels, ante* 150, 156.

See Executory Deviſe. *ante* 288. *See* Intention, *ante* 151.

A Leaſe for a Term of Years is a *Chattel real*; and becauſe many Mens Eſtates conſiſt only in ſuch *Chattels*, and many Wills have been made concerning ſuch Eſtates, I ſhall therefore ſhew,

(1.) *By what Words a Term for Years will paſs.*
(2.) *Where a Term is veſted, and where not.*
(3.) *Where 'tis extinguiſh'd by the Deſcent of the Inritance.*
(4.) *Where the whole Term paſſeth by a Will, where not.*

(5.) *Where*

5. *Where the Remainder of a Term is well limited, where not.*
6. *What Intereſt one Executor hath in a Term where there are more than one.*

(1.) And firſt by what Words it paſſeth, *viz.* the Teſtator being poſſeſs'd of a *Term of Years*, gave ſeveral ſpecifick Legacies to ſeveral Perſons, and then devis'd *All his other Goods* and Chattels to his Wife: And the Queſtion was, Whether ſhe ſhould have this *Leaſe*, it being a *Chattel-real*. And adjudg'd, That ſhe ſhould; for it paſſes by the Words *All my Goods*, if there are no other Circumſtances to guide the Intention of the Teſtator. Portman verſus Willis, Cro. Eliz. 589. Moor 352. Goldſ. 129

(2.) And where there is a Deviſe of a Term, the Property is veſted in him by his *Entry*; and if after ſuch *Entry* he enjoy it, tho' he die before Probate, yet upon his Death it ſhall go to his Adminiſtrator. Dyer 367.

But ſometimes the Property of a Term is not veſted in the Deviſee; as where there was Grandfather, Father and Son, and the Grandfather having a Term for Years devis'd it to the Son for twenty one Years, who was then an Infant, and that the Father ſhould have it during the Minority, *&c.* and made the Infant Executor, and dy'd. The Father enter'd, and made a Leaſe for ſeven Years, until the Infant came of Age, and made him Executor, and dy'd. Adjudg'd, That the Infant ſhall avoid this Leaſe made by his Father, becauſe the Deviſe was executory to him, and did not veſt 'till the Son was of Age, and then he being Executor ſhall avoid all mean Acts of his Father. Dunmole verſus Gliles, 2 Browl. 308

(3.) Sometimes a Term is extinguiſh'd by the Deſcent of the Inheritance upon the ſame Perſon. And here I cannot but take Notice of a very nice Diſtinction made by the Chief Baron *Manwood*,

Lee verſus Lee, 3 Leon. 110. Cro. Eliz. 128. Moor 268.

wood, *Anno* 31 *Eliz.* (*viz.*) Where *Lands* are devis'd for a Term of Years to one, and if he die within that Term, then to another; in ſuch Caſe the firſt Deviſee can do no Act to prejudice him to whom the Reſidue is devis'd: But where a *Term for Years* is devis'd, and *not Lands*, as before, with ſuch a Remainder to another; if the firſt Deviſee die within the Term, there it may be extinguiſh'd by the Deſcent of the Inheritance upon the Deviſee, or by his own Act or Forfeiture: And his Reaſon was, That where a *Term of Years* is devis'd, 'tis a compleat Eſtate of itſelf, over which the Deviſee hath an abſolute Power during the Term; but where *Lands* are devis'd *for Years*, 'tis otherwiſe. And therefore where the Teſtator had three Sons, *Francis*, *Jaſper*, and *George*, and devis'd his *Lands* to *Jaſper* for *twenty one Years*, to pay his Debts, and made him Executor; and that if he dy'd within that Term, then *George* ſhould have what ſhall accrue of the twenty one Years, and that he ſhould be Executor; then he devis'd the Lands to each of his three Sons in Tail, and dy'd. *Francis*, the eldeſt, dy'd without Iſſue; *Jaſper* enter'd, and dy'd within the Term, leaving Iſſue a Son, who was the Defendant, againſt whom *George* his Uncle, brought an Ejectment. And it was adjudg'd, That by the Deſcent of the Inheritance on *Jaſper*, the Term was extinguiſh'd in him, yet it was reviv'd in *George*, and was a new Deviſe to him, and it did not depend upon the Deviſe to *Jaſper*.

In Matthew Manning's Caſe 'tis held, That there is no Difference where one deviſeth his Term, Remainder over, and where he deviſeth Land *which he hath in Leaſe, or the Uſe, or Occupation, or the Profits of the Land.*

ante 293.

Dyer 74. b.

(4.) The Teſtator devis'd his *whole Term*, proviſo, that if the Deviſee die, living *R. B.* then the Term and Intereſt ſhall remain to him. The Deviſee ſold this Term, and dy'd in the Life-time of *R. B.* Adjudg'd, That he had no Remedy to recover it, for the Sale was good.

But

But where the Deviſe is of a Term to his Wife *for ſo many Years as ſhe ſhould live*, and after her Deceaſe, the Reſidue to his Son, and the Wife was made *Executrix*, and the Teſtator dy'd, leaving ſufficient Aſſets to ſatisfy his Debts, beſides the Term. Then the Widow prov'd the Will, and enter'd, claiming her Eſtate for Life, and afterwards marry'd, and ſhe and her Huſband ſold the Term. This Sale was adjudg'd not good; for the whole Term was not devis'd to her, though it was poſſible ſhe might have ſurviv'd it; but the *jus Poſſeſſionis* was divided from the *jus Proprietatis*, and ſhe having no Property in it, the Sale was void. Dyer 358.

The Teſtator had a Term of forty Years in an Houſe, and by Will devis'd his Houſe to another, without mentioning for what Eſtate. This carries the whole Term; for the Deviſee can neither have an Eſtate at Will, or for Life, or for one or two Years, therefore the whole Term muſt paſs. Dyer 307.

Deviſe of a Term to his Son when he comes of Age, and in the mean time (he being then about eighteen) that his Mother ſhould have the Occupation *and Profits* of the Land, whom he made *Executrix*, and dy'd. The Widow prov'd the Will, and enter'd, and *ſold* the Term, and afterwards the Son came of Age. The Court was divided, whether the Sale was good or not; but in the Caſe before-mention'd it was held, that ſhe had only *jus Poſſeſſionis*, and no Property. Dyer 318.

(5.) In many Caſes Terms for Years have been devis'd with *Remainders* over, either in Tail, or otherwiſe; therefore it may be neceſſary to ſee what the Law is in ſuch Caſes. ante 150, 288.

'Tis clear, that a Term cannot be entail'd to the *Heirs of the Body*; as a Deviſe to his Daughter *B.* and to the *Heirs of the Body* begotten, and Dyer 7.

if ſhe *die without Iſſue* during the Term, Remainder to his Daughter *R.* in Tail. The eldeſt Daughter marry'd, and dy'd without Iſſue, and within the Term, and her Huſband ſold it, and held good; for a Term cannot be thus entail'd.

Higgins *verſus* Mills, Cro. Eliz. 143.

So a Deviſe of a Term to the Wife for Life, and afterwards to his Son *Humphrey*, and the *Heirs Males of his Body*; he ſold the Term, and dy'd, leaving Iſſue *John*, who claim'd it. But adjudg'd againſt him, becauſe he cannot have a Right to a Term for Years, as *Heir Male*, for it cannot be entail'd after that Manner; and if 'tis ſo entail'd, his Executor, and not his Heirs, ſhall have it.

Stanley *verſus* Baker, Moor 220.

But *Anno* 27 *Eliz.* there was a Deviſe of a Term for Years to his *eldeſt Son*, and the *Heirs of his Body*; and for Default of ſuch Iſſue, that it ſhould remain to *his Daughters*, there being two then living, and one born afterwards. The eldeſt Son ſold the Term, and dy'd without Iſſue. And this Sale was held void againſt the Daughters.

Dyer 7.

A Deviſe of a Term to one *for Life*, and if he dy'd before the Expiration of the Term, that it ſhould remain to another. This Remainder is good, becauſe the Teſtator had not diſpos'd the whole Term, but only ſo much as ſhould incur during the *Life* of the Deviſee.

Welkden *verſus* Elkington, Plow. Com. 517.

But where the Deviſe was that the Wife ſhould have the *Land for ſo many Years of the Term as ſhe ſhould live*, and after her Deceaſe, the Reſidue to *his Son*. Here the Remainder was held good, becauſe all the Intereſt of the Term was not given to the Wife, but only conditionally, (*viz.*) for *ſo many Years as ſhe ſhould live.*

* Paramor *verſus* Yardly, Plow. Com. 53.

* And ſo it was held a Year afterwards, where the Deviſe was of a Term to his Son, nevertheleſs that

that his Wife ſhould have the Profits of the Land, *during her Life.* This was held good by tranſpoſing the Sentences, (*viz.*) to the Wife *for Life*, Remainder to the Son.

But *Anno* 10 *Eliz.* ſuch a Remainder of a Term limited to another after a Deviſe to one *for Life* was held void, becauſe in that Caſe the Deviſee *for Life* was alſo made *Executor*; but they all agreed ſuch a Remainder was good, if the Deviſee had not been made Executor. Dyer 277. *b*

Deviſe of a Term to his Daughter for Life, and if ſhe dy'd before *Samuel*, then to him upon ſuch reaſonable Compoſition as ſhall be thought fit by his Overſeers. The Daughter dy'd during the Term; then *Samuel* enter'd without any Compoſition made. And it was adjudg'd, that the Daughter had the whole Term by this Deviſe, and that the Remainder to *Samuel* was void, becauſe the Daughter might have out-liv'd the Term, and therefore *Samuel* had only a Poſſibility that ſhe might die before, and ſuch a Poſſibility cannot be limited in *Remainder*. Woodcock *verſus* Woodcock Cro. Eliz. 795.

But a new Diſtinction was invented in *Matthew Manning's* Caſe, which was thus, (*viz.*) the Teſtator was poſſeſs'd of a Term for Years in Lands, and he devis'd the *Uſe and Occupation* to his Wife *for* **Life*, and afterwards to *Matthew Manning*, during the Reſidue of the Term. It was held that *Matthew* did not take by Way of *Remainder*, but by Way of *Executory Deviſe*; for that was the Intention of the Teſtator, who might deviſe it after that Manner, which he could not do by Grant or Feoffment. Matthew Manning's *Caſe*, 8 Rep. 94. *a.* ante 293.

(6.) † As to Co-Executors, *viz.* where a Term is devis'd to two Executors, and one of them grants the whole to a Stranger, ſuch Grant is good, becauſe ſeveral Executors are but one Perſon

* *Since this Caſe a Remainder of a Term limited after a Deviſe to another* for Life *is good by Way of Executory Deviſe* ante 288.

† Dyer 23. *a.*

ſon in Law, and each of them hath an entire Authority and Intereſt in the whole.

Pannel *verſus* Ferne, Cro. Eliz. 347. Moor 250 Gold. 185

So where the Deviſe was to two Executors until the Teſtator's Debts ſhould be paid, *&c.* they enter'd generally, and one of them ſold the Term to the Plaintiff, and the other to the Defendant. Adjudg'd, That they did not take this Term as Legatees, but as Executors, and ſo the Sale by one was good: But if they had took it as Legatees, then they had been Tenants in Common, and ſo they could have ſold no more than each Moiety.

Gibbons *verſus* Somers, 3 Lev. 22.

The Teſtator poſſeſs'd of a Term for Years, devis'd it to his Son *John*, and if he dy'd unmarry'd, and *without Iſſue*, then to his Daughters and their Executors; and if *John* is marry'd, and have *no Iſſue*, then after the Death of his Wife to his Siſters. *John* dy'd without Iſſue; adjudg'd, That this Remainder of the Term to the Daughters was void, being limited to them upon the Death of their Brother, *without Iſſue*; 'tis true, ſuch a Remainder hath prevail'd in Caſe of an Inheritance; for ſo is *Pell* and *Brown*'s Caſe, but never yet of a Term for Years.

ante 282.

Time of making a Will.

IN the Civil-Law there are many Niceties as to the *Time* of making a Will, eſpecially relating to Legacies; for if the Deviſe is in *general Words*, it muſt relate to the *Time when the Will was made*, and not to the *Death of the Teſtator*. As for Inſtance, if the Teſtator deviſe 10 *l.* to his *Pariſh Church*, and afterwards removes into another Pariſh and dies there; this Legacy is due to the Pariſh where he liv'd when the *Will was made*, and not to the Pariſh where he dy'd.

Godolph. 272.

Yet

Yet if the Deviſe had been in *general Words* to *his Kindred*, that includes as well ſuch who were born after the making the Will, even to the Time of the Death of the Teſtator as thoſe who were born before; or if he give *all his Money* in the *Bank*, and at *that Time* he had 1000 *l.* there, and he lives afterwards 'till he had 2000 *l.* there, in this Caſe there paſſes only the 1000 *l.* becauſe the Legacy is to be computed according to what he had *at the Time of the making the Will*, and not to what he had at his Deceaſe.

And in theſe and the like Caſes, the Words of the Deviſe muſt be in the *Preſent Tenſe*, viz. *I give*; for if 'tis in *general Words*, and in the *Future Tenſe*, then the *Time of the Death* of the Teſtator is chiefly to be conſider'd. As if the Teſtator deviſe, that his Executor *ſhall* diſpoſe the Profits of his Eſtate, it muſt be underſtood of ſuch Profits which he had at his Death, becauſe the Word *Profits* is general and univerſal.

So where the Words are *indefinite*, as a Deviſe of all his *Corn*, it muſt refer to all he hath at the *Time of his Death*.

Tenant in Tail exchang'd his Lands with *W. R.* who enter'd, and being ſeis'd in Fee of *other Lands*, devis'd ſeveral Parcels thereof, and amongſt the reſt, a particular Parcel to his Heir; Proviſo, that he do not re-enter, nor claim *any other of his Lands*; and if he do, then the Eſtate of the Lands devis'd to him ſhall ceaſe. Tenant in Tail dy'd, and his Iſſue in Tail enter'd on the Lands given in Exchange, and waved the Lands which were taken in Exchange; and then the Heir of *W. R.* re-enter'd on the *Lands given in Exchange*. Adjudg'd, That this Entry was no Breach of the Condition, becauſe the Lands given in Exchange were not the Lands of

Barber *verſus* Topsfield, Godb. 99.

the Teſtator, at the Time of the Deviſe, and therefore out of the Proviſo.

Tort de ſon Executor.

See *Aſſets, ante* 96.

AN Executor *de ſon Tort* is he, who takes upon himſelf the Office of an Executor, without any lawful Authority, and by this Means he makes himſelf chargeable to the rightful Executor, and to all Suits of the Creditors of the Teſtator; and likewiſe to Legatees, ſo far as the Goods of which he wronfully poſſeſs'd himſelf amounts unto.

There are ſeveral Acts which make a Man Executor *de ſon Tort*.

By proving the Will with the Teſtator's Money.

By the converting the Goods to his own Uſe.

By delivering Money or Goods to the Creditors.

By receiving Debts due to the Deceas'd, or releaſing them.

By delivering Legacies in Kind.

By ſuing as Executor for a Debt due to the Deceas'd.

By pleading as Executor.

By ſelling any Part of the Deceaſed's Goods as Executor.

By diſcharging Debts with the Money of the Deceaſed.

And generally by all Acts of Acquiſition, transferring, or Poſſeſſion of any of the Eſtate or Goods of the Deceas'd, but not by Acts of Piety or Charity.

As providing Neceſſaries for the Children of the Deceas'd.

By

By feeding or preſerving his Cattle.
By repairing his Houſes in Decay.
By taking an Account of his Eſtate, or by making an Inventory of it.

And by the Statute 43 *Eliz.* 'tis enacted, That *if any Perſon ſhall obtain any Goods or Debts of the Inteſtate, or by Fraud releaſe or diſcharge Debts due to him, as by procuring Adminiſtration to be granted to a Stranger who is poor, and not to be found, with an Intent to obtain the Inteſtate's Eſtate, and not upon any valuable Conſideration, or in Satisfaction of juſt Debts anſwerable to the Value of the Goods or Debts ſo obtain'd, he ſhall be charg'd as* Executor de ſon Tort, *to the Value of thoſe Debts or Goods.* 43 Eliz. cap. 8.

If a *Stranger* takes the Goods of the dead Man into his Poſſeſſion, without doing any other Act as an Executor, *viz.* paying or receiving Debts or Legacies, or diſpoſing the Goods. It was made a *Quære* in *Dyer*, Whether this made him *Executor de ſon Tort?* And my Lord *Rolls* in abridging the Caſe, tells us, that it did not. Floyer *verſus* Southcott, Dyer 105 *b.* 1 Roll. Abr. 918.

But this muſt be underſtood where there is a rightful Executor made, or where Adminiſtration is duly granted to another; for in ſuch Caſe the Creditors of the dead Man have a proper Perſon againſt whom to bring the Action: But where no Executor or Adminiſtrator is made, then the Creditors have no other Perſon againſt whom they can have any Remedy, but againſt him who hath the Goods in his Poſſeſſion, and claims them as his own, or who uſeth or ſelleth them. So if he claims them as Executor, or pays Debts or Legacies, or receives any Debts, this is an expreſs Adminiſtration as Executor, and in ſuch Caſe he ſhall be charg'd as *Executor de ſon Tort.* Read's *Caſe*, 5 Rep. 33. Co. Lib. Ent. 144. 2 Leon. 224 3 Leon. 57.

So

So if a *Stranger* take the Goods before the rightful Executor hath prov'd the Will, which is afterwards prov'd, he ſhall be charg'd as *Executor de ſon Tort*, becauſe there may not be Goods enough come to the Poſſeſſion of the rightful Executor to ſatisfy the Teſtator's Debts, and he can be chargeable with no more than what actually comes to his Hands, and the Creditors have no Remedy but in *Chancery*, to compel him to ſue the *Executor de ſon Tort*; therefore he muſt be charg'd as ſuch.

Keeble *verſus* Oſbaſton, 1 Roll. Abr. 919.

The *Wife* had Adminiſtration granted to her, and dy'd, and an Action of Debt was brought againſt her *Huſband*, who pleaded *ne unques Executor*. The Jury found he detain'd *bonam Partem Bonorum*, and ſold them; now though *bona Pars* is very uncertain, yet he ought not to detain any Part, for if he doth he is *Executor de ſon Tort*, and chargeable as ſuch.

Cro. Eliz. 472.

So where the *Wife* being Executrix made a fraudulent Gift of the Goods, but ſtill kept them in her own Poſſeſſion; afterwards ſhe marry'd and dy'd, and an Action being brought againſt the *Huſband*, he pleaded *Plene Adminiſtravit*; it was adjudg'd againſt him; for the Gift being fraudulent, the Property of the Goods remain'd ſtill in his Wife; and he having paid Legacies ſince her Death, is become *Executor de ſon Tort*, and ſo liable to the Action.

Wilcox *verſus* Watſon, Cro. Eliz. 405. Moor 396.

But in ſome Caſes, though there is an *Executor de ſon Tort*, yet he ſhall not be charg'd as ſuch, but the *Tort* may be purg'd by a ſubſequent Adminiſtration. As for Inſtance, the Mother poſſeſs'd herſelf of the Goods of the Inteſtate as *Executor de ſoi Tort*. The Son afterwards took out Adminiſtration, and paid the Debts as far as the perſonal Eſtate amounted, being to the Value of what the Mother receiv'd, as well as to the Va-

Whitmore *verſus* Porter, Cro. Car. 88.

lue

lue of all the other Goods of which the Inteſtate dy'd poſſeſſed. Then *one of the Creditors* brought an Action againſt her as *Executor de ſon Tort*. She pleaded *Plene Adminiſtravit*, and all this Matter was found: And it was adjudg'd ſhe was not liable to this Action at the Suit of a *Creditor*, becauſe it was brought *after the Adminiſtration* was granted to her Son, for then ſhe is chargeable to *him*, and if ſhe ſhould be likewiſe liable to the *Creditor*, then ſhe would be doubly charg'd, which ſhe ought not to be, eſpecially ſince the Adminiſtrator had paid as far as the Goods amounted; and therefore 'tis not reaſonable that ſhé ſhould be accountable for any more.

So where an *Executor de ſon Tort* enters, and takes Poſſeſſion of the Goods and ſells them, and afterwards *takes out Adminiſtration*, yet the Sale is good by Relation; but if the Inteſtate was entitled to a Leaſe for Years in Reverſion, and ſuch an *Executor de ſon Tort* had ſold the Term, and afterwards had taken out Adminiſtration, and then had ſold it again to another, the ſecond Vendee ſhall enjoy it, becauſe there can be no *Executor de ſon Tort* of a *Reverſion*; beſides no Entry can be made on a Term in Reverſion. Kenrick *verſus* Burges, Moor 126.

And yet where Debt was brought againſt the Executor of *R. B.* who pleaded that *R. B.* dy'd Inteſtate, and that *certain of his Goods came to this Defendant's Hands*, and that afterwards Adminiſtration was committed to another, to whom he deliver'd the ſaid Goods. It was adjudg'd, That if the Adminiſtration had been committed to the Defendant himſelf it would not have purged the *Tort*, much leſs where 'tis granted to a Stranger; for having once made himſelf liable to the Action as *Executor de ſon Tort*, he ſhall never Bradbury *verſus* Reynel, Cro. Eliz. 365.

never after diſcharge himſelf by Matter *ex poſt Facto.*

Lawry verſus Aldred, 2 Brownl. 183.

Debt againſt two Executors, one of them confeſs'd the Action, and the other pleaded, that the Teſtator dy'd on ſuch a Day, and that he intending to adminiſter, bury'd the Corpſe, and caus'd the Goods to be kept ſafely, and that afterwards Adminiſtration was granted to him by the Archdeacon; and then *W. R.* brought an Action againſt him as Adminiſtrator, and recover'd ſo much, and averr'd it was for a true Debt, and that he had not Aſſets, beſides the Goods and Chattels which did amount to ſatisfy that Debt. To this Plea in Bar the Plaintiff demur'd; and adjudg'd, That the Defendant, by medling with the Goods, had made himſelf *Executor de ſon Tort*; and by his pleading that Adminiſtration was committed to him by the Archdeacon, 'tis wrong, becauſe that being a ſubordinate Juriſdiction, he ought to have ſet forth that of right it belong'd to him to grant Adminiſtration, and there being no rightful Adminiſtrator, the Recovery againſt him as ſuch is void, and if ſo, all the Goods remain Aſſets in his Hands.

Keble verſus Oſbaſton, Hob. 49. 1 Roll. Abr. 915.

So where Debt was brought againſt an Executor, who pleaded that the ſuppos'd Teſtator dy'd Inteſtate, and that before the Action brought, Adminiſtration was granted to *E. K. &c.* The Plaintiff reply'd, That *W. K.* dy'd Inteſtate, and that after his Death, and before Adminiſtration was granted to *E. K.* divers Goods of the ſaid Inteſtate came to the Defendant's Hands, which he adminiſter'd, *ſeu aliter ad uſum ſuum proprium convertit*, and the Plaintiff had a Verdict. For ſince the Defendant was *Executor de ſon Tort* before the Adminiſtration granted, the Plaintiff had good Cauſe of Action veſted in him, which ſhall not be taken away by an Adminiſtration afterwards granted,

granted, though it was granted before the Action brought; and the rather, becauſe the Goods taken by Wrong, ſhall not be Aſſets in the Hands of the Adminiſtrator, till they are converted by him.

But where an *Executor de ſon Tort* dy'd Inteſtate, having poſſeſs'd himſelf of a Term for Years, and his Mother took out Adminiſtration, and marry'd again, and the Huſband paid the Debts of the firſt Inteſtate to the Value of the Term. It was adjudg'd, That by this Adminiſtration the *Tort* was purg'd, and if Actions ſhould be brought againſt the Huſband, he may plead *Plene Adminiſtravit*; for though the *Executor de ſon Tort* could not pay himſelf, yet he may pay other Perſons who are Creditors to the Inteſtate. Baker *verſus* Berisford, 1 Sid. 76. Raim. 58. 1 Lev. 154.

So where Debt upon a Contract of the Inteſtate, was brought againſt an *Executor de ſon Tort*, and pending the Action he took out Letters of Adminiſtration, and then pleaded, that the Inteſtate ow'd him 50 *l.* upon Bond, and that he adminiſter'd, and by Virtue thereof did *retain* his Goods to the Value of that Debt, beſides which, he had *nulla Bona* of the Inteſtate. And upon a Demurrer, this was adjudg'd a good Plea, becauſe the Adminiſtration granted (though *pendente lite*) doth purge the *Wrong*, and he ſhall retain the Goods to ſatisfy a Debt due on a Bond, before he ſhall be oblig'd to pay a Debt upon a Contract. Williamſon *verſus* Norwich, 1 Roll. Abr. 923. Stiles 337.

But though ſuch an Adminiſtration will enable an *Executor de ſon Tort* to *retain*, yet it will not abate an Action brought againſt him; for if he convert the Goods, and take out Adminiſtration afterwards, though before the Writ brought, it will not hinder the Plaintiff from charging Pyne *verſus* Woollard, 2 Vent. 179

charging him in an Action as *Executor de ſon Tort.*

'Tis true, without ſuch a ſubſequent Adminiſtration the Law is clear, that an *Executor de ſon Tort* cannot *retain*; and the Reaſon is plain, becauſe he doth not come to the Poſſeſſion by due Courſe of Law, or by the Act of any Court, but meerly by his own wrongful Act.

* The ſame Point hath been adjudg'd in many Caſes more, as you may find in the Margin.

It hath been a Queſtion, whether an † *Executor de ſon Tort* takes out a ſubſequent Adminiſtration by what Name he ſhall be ſued. And there are ſome Opinions, ‖ that he ſhall be ſued as *Adminiſtrator*, and not as *Executor de ſon Tort.*

* But the better Opinion is, that when by his tortious Act he hath given the Plaintiff an Advantage to ſue him as *Executor de ſon Tort*, he cannot by his own Act purge that *Tort*, and cauſe the Plaintiff to ſue him by another Name, but he hath † Election to ſue him by either Name.

Debt againſt an ‖ Executrix, who pleaded that her Huſband dy'd Inteſtate, and that Adminiſtration was granted to her, *cujus prætextu* ſhe adminiſter'd her Huſband's Goods. And upon Demurrer to this Plea, the Queſtion was, Whether the Defendant ought not to have travers'd that ſhe was Executrix, or even adminiſter'd as Executrix? And adjudg'd not: 'Tis true, if the Plaintiff had reply'd, that ſhe adminiſter'd *de ſon Tort*, and the Defendant had demurr'd to that Replication, ſhe had confeſs'd it to be true by the Demurrer; and in ſuch Caſe the Action had been well brought againſt her either as *Executrix de ſon Tort*, or Adminiſtratrix, though ſhe was neither at that Time, but had obtain'd Adminiſtration

Ireland *verſus* Coulter, Cro. Eliz. 630. 5 Rep. 30. 1 Roll. Abr. 922. Moor 527.

* Alexander *verſus* Lamb, 1 Brownl. 103. Yel. 137.

† Bond *verſus* Green; Godb. 217.

‖ 3 Leon. 198.

* Stubbs *verſus* Rightwiſe Cro. Eliz. 102.

† Bethel *verſus* Stanhope, Cro. Eliz. 810.

‖ Bowers *verſus* Cook, 5 Mod. 136 145. Powers *verſus* Clerke, S. C. 1 Salk. 298. ante 269.

ſtration afterwards; but by this Plea the Defendant did allow, that ſhe was chargeable as to the *Right*, but that ſhe ought to be charg'd in another Manner, and ſhews how, *viz.* as *Adminiſtratrix*, which is a full Anſwer to the Declaration.

In *Whitmore's* Caſe before-mention'd, the Court would not allow that an *Executor de ſon Tort* ſhould be doubly charg'd, both at the Suit of a Creditor, and at the Suit of the rightful Adminiſtrator; but *Anno* 31 *Car.* 2. the Chief Juſtice *North* was of another Opinion, *viz.* An *Executor de ſon Tort* poſſeſs'd himſelf of the Goods; a Creditor of the Inteſtate brought an Action againſt him, and had a Verdict and Judgment, and took the Goods in *Execution*; then the *rightful Adminiſtrator* brought an Action of Trover againſt him for the ſame Goods. And it was held, that this *Execution* would not diſcharge him from that Action; 'tis true, it would be a good Diſcharge againſt any other Creditor of the Inteſtate, and he might plead *Riens inter manes*, but not againſt the *rightful Adminiſtrator*; for Men muſt not meddle with the perſonal Eſtates of others, without any Manner of Right ſo to do. 1 Vent. 349

Action againſt the Defendant *as Executor*, who pleaded, that *W. R.* made a Will, and that he (the Defendant) *ſuſcepto ſuper ſe onere Teſtamenti*, did pay ſeveral Sums due on Specialties, and that there was ſo much owing by the Teſtator to his (the Defendant's) Wife, and that he retain'd ſo much of the Teſtator's Goods to ſatisfy that Debt, and had not Aſſets *ultra*. And upon Demurrer to this Plea, it was adjudg'd ill, becauſe it did not appear, but that the Defendant might be *Executor de ſon Tort*, and if ſo, he cannot retain; he ſhould have entitled himſelf to the Executorſhip, and not only ſay *ſuſcepto ſuper ſe onere, &c.* Atkinſon *verſus* Rawſon, 1 Mod. 208

'tis

'tis true, the Plaintiff here declar'd againſt him as Executor, but that will not make him ſo.

Whitehall verſus Squire, 1 Salk. 295

In a ſpecial Verdict in Trover for a Gelding, the Caſe was, *W. R.* was poſſeſs'd of this Gelding, which he put to the Defendant to Paſture, and afterwards dy'd Inteſtate; and *before Adminiſtration granted*, the Plaintiff, at the Deſire of the Defendant, bury'd him, and laid out 23 *l.* in the Funeral; whereupon the Plaintiff agreed, that the Defendant ſhould have the Gelding at 10 *l.* and he (the Plaintiff) gave him a Note for the other 13 *l.* Afterwards the Plaintiff took out Adminiſtration, and then he brought this Action of Trover for the Gelding, and *Holt*, Chief Juſtice, held, that it would lie, becauſe the Defendant made himſelf *Executor de ſon Tort*, by intermeddling with the Gelding; 'tis true, he had the Conſent of the Plaintiff ſo to do, but it was before he had adminiſter'd, and by Conſequence before he had any Right to Conſent, and therefore that would not alter the Caſe, but the other Judges were againſt him.

Willan verſus Gill, Raim. 123.

The Teſtator *Allington* deviſed a Legacy, and made *Gilham and Denhurſt* Executors, and dy'd; then *Gilham* dy'd Inteſtate, and afterwards *Denhurſt* made a Will, and *R. W.* Executor, and dy'd; then the Adminiſtrator of *Gilham* ſued *R. W.* the Executor of *Denhurſt* for this Legacy due to his Inteſtate by the Will of *Allington*; and upon a Motion for a Prohibition, it was held he might, by the Spiritual Law as *Executor de ſon Tort*, and even as he was Executor of *Denhurſt*, tho' by our Law he muſt be ſued as Executor of *Allington*. Three Judges againſt the Prohibition.

35 H. 6. 31.

As an *Executor de ſon Tort* cannot maintain any Action, becauſe he cannot produce any Will to juſtify an Action, ſo he will be ſeverely puniſh'd for a *falſe Plea*, as if he plead *ne unques Executor*,

Executor, &c. and it is found againſt him, the Execution ſhall be awarded for the whole Debt, though he medled with a Thing but of a very ſmall Value: As for Inſtance, he was charg'd with a Debt of 100 *l.* when he medled only with a *Bible*. Kitchin *verſus* Dixon, Noy 69. Goldſ. 116

But though he cannot bring an Action, yet there are ſeveral Acts which he may lawfully do, as he may pay any of the Creditors of the Inteſtate, but not himſelf, and he ſhall be allow'd all ſuch Payments which he made, and which were incumbent for the rightful Executor to pay; 'tis true, there can be no *Executor de ſon Tort* where there is a *rightful Executor*; but in ſuch Caſe, if the Widow or any other Perſon payeth the Debts which the Executor muſt pay, ſhe ſhall be allow'd it again in Equity. Ayres *verſus* Ayres, 2 Ch. Rep. 33.

It hath been a Queſtion, Whether there can be an *Executor de ſon Tort of a Term for Years?* becauſe where a Man enters *tortiouſly*, he is a *Diſſeiſor*, and not a Termer: But the better Opinion is, that there may be an *Executor de ſon Tort of a Term*, and that he is puniſhable in an Action of *Waſte*. For there being a *lawful Term* in Being, he in Reverſion cannot maintain an Action of Treſpaſs during the Term, and therefore 'tis reaſonable that he ſhould have a Remedy upon the Contract, againſt him who claims a Title by that Contract. *Mayor of* Norwich *verſus* Johnſon, 3 Lev. 35. 3 Mod. 90. 1 Shore 242

As to an *Executor of an Executor de ſon Tort*, before the Statute 30 *Car.* 2. *cap.* 7. he was not liable for the waſting and converting any of the Goods of the Teſtator; but now by that Statute he is made liable, as the Teſtator or Inteſtate would have been if he had been living. ante 226, 230, 274.

And three Years before the making this Statute, it was ruled in Equity, That if an Executor commits *Waſte*, and dies. his Executor is liable to make Chamberlain *verſus* Chamberlain, 1 Ch. Rep. 257.

make good the *Quantum* of the *Devaſtavit* to the Creditors, ſo far as he hath Aſſets of the firſt Executor who waſted.*

Brown verſus Collins, 2 Lev. 110.

* Aſtry verſus Nevitt, 2 Lev. 133.

'Tis true, this was againſt the Opinion of my Lord *Hales* in a like Caſe, who held, that the *waſting* by an *Executor* was a *perſonal Wrong* and dy'd with his Perſon. But the * Chief Baron *Turner* was of a contrary Opinion in the Caſe of an *Executor de ſon Tort*, who had waſted and left an Executor and Aſſets; for he held, that the perſonal Wrong of waſting did not die with the Perſon who had committed the Waſte, but his Executor ſhall be liable ſo long as he held any Aſſets; but ſince the Statute this is no longer a Queſtion.

By the ſtatute 4 & 5 of Will. cap. 24 it is enacted, That the Executors and Adminiſtrators of any Executor or Adminiſtrator of Right, who ſhall waſte the Goods of his Teſtator or Inteſtate, ſhall be chargeable as their Teſtator or Inteſtate might have been.

Wills.

A Will is only a Signification of a Man's Mind, how his Eſtate ſhall go after his Death; 'tis a Conveyance allow'd by the Civil Law to People *in extremis*, who had neither Time or that Aſſiſtance which was neceſſary to make a formal Alienation, and it was chiefly intended for Military Men, who are ſuppos'd to be always *in extremis*; and therefore the Ceremonies and Number of Witneſſes which were requiſite to the Wills of other Men, were diſpens'd withal in Military Teſtaments; but afterwards, the Rules of ſuch Teſtaments were obſerv'd in other Wills.

But by our Law it formerly was only a Privilege allow'd to the Inhabitants of certain *Burroughs* in this Kingdom, where, by particular Cuſtom, they had Liberty to diſpoſe their Houſes and Lands by Will, for in other Places they were not deviſeable at Common Law; and the Reaſon was, becauſe Wills were uſually made when Men were *in extremis*. And the Law ſo much favour'd the next Heir, (who was to ſit in the Seat of his Anceſtor, and to perform the like Services to his King

King and Country) that it ſhould not be in the Power of ſuch Anceſtor in his laſt Sickneſs to diſinherit his Heir.

And where a Man had ſeveral Sons, he could not by any Conveyance whatſoever give the youngeſt Sons any Part of his Lands which came to him by Deſcent, without the Conſent of his *Heir*. 'Tis true, he might give a reaſonable Part of it to a Daughter in Marriage, or to reward the Service of a faithful Servant, or to a Religious Houſe, but then it muſt be done in the Time of his Health; for if ſuch Gift was made in the Time of Sickneſs, it was void without the Conſent and Approbation of the Heir at Law. *Glanv. lib. 7. fol. 44*

But it was certainly a Defect at Common Law, not to allow Men the Diſpoſal of their *Lands* by Will; for 'tis reaſonable, they ſhould have Power at any Time during their Lives, and even in their laſt Sickneſs by ſome Sort of Conveyance or other, to give their *Lands* to their Children or Kindred, as in Duty they ſhould oblige them, I mean the *Lands* which they had by *Purchaſe*, and not by *Deſcent*.

The uſual Way in thoſe Days was by *Feoffment*, *Fine*, or *Recovery*, but this could not be done by Men *in extremis*, becauſe there are a great many Solemnities, and much Time requir'd to perfect theſe Conveyances.

Therefore when they were in Health, they convey'd their Eſtates to *Feoffees in Truſt*, and they would direct by their laſt Wills how thoſe Feoffees ſhould diſpoſe theſe Eſtates, and becauſe a Truſt was properly under the Juriſdiction of the *Chancery*, that Court would compel the Feoffee to perform his Truſt, in Caſe he ſhould refuſe to do it at the Requeſt of the Perſon for whom he was intruſted.

But this Courſe was found to be very inconvenient, for the Feoffees having the Land, and the

Party himself the Use of it; if another Person claim'd any Title to it, he would not tell whom to sue, because he could not know who was the right Owner. Women were defrauded of their Dower, and Men of being Tenants by the Curtesy, Lords of their Reliefs and Heriots, Tenants of their Leases, and Creditors of Extents for just Debts, because it was the *Owner* of the Lands who was chargeable with these Duties, and the Feoffee was now become the Owner; but the Feoffor, tho' he was the old Owner, and the visible Person who took the Profits of the Estate, yet he was not such an Owner who could be properly said to be seis'd of the Lands, so as his Wife could be endow'd, or the Lands extended for his Debt.

These Inconveniences were remedy'd by several Statutes, which I shall not mention, being not proper in this Place; but the Law was still the same in Relation to *Wills* until the Statute 32 *H.* 8. in the Preamble whereof 'tis recited, That the *King being always gracious to his obedient Subjects, and considering that they were not able to pay their Debts, or advance their Children out of their Personal Estates, was contented that it be enacted by Authority of that Parliament, that his Subjects might, by their last Wills and Testaments, devise their Mannors, Lands, Tenements, and Hereditaments at their Pleasure*; but in Manner following.

32 H. 8. cap. 1.

It must be a Will in *Writing*. the Testator must be *sole seised* of an Estate in Fee-Simple, and the Lands must be of *Soccage-Tenure*. For if any Part of his Lands were held *in Capite* by Knight's Service of the King, then he could devise but *two Parts of the whole*, as well *Soccage* as *Capite Lands*. For the third Part was to descend to the Heir at Law to answer the Duties to the Crown, such as *Wardship, Livery, Primer-Seisin, &c.* So

34 H. 8. cap. 5. *being an Explanation of* 32 H. 8

So if the Teſtator held Lands by *Knight's Service of a Subject*, he could deviſe but *two Parts* of it, for the third Part was to deſcend to ſatisfy *Wardſhip*.

But by any other Conveyance, as by *Fine*, *Feoffment*, *Recovery*, *&c.* a Man might convey all his Lands in Fee-Simple which were held *in Capite* to his Wife, or any of his Children, and diſinherit his Heir; but this he could not do by *Will*, becauſe the Common Law ſet ſo high a Value upon a *Fee-Simple Eſtate*, and ſo much favour'd the *Heir*, that it would not ſuffer the Anceſtor to diſinherit him of ſuch Eſtate by a Will, which was frequently made in the Time of the laſt Sickneſs, when his Mind might be diſcompos'd, and when he might be prevail'd on by indirect Perſwaſions to do what he would not have done when in perfect *Health*.

An Eſtate for a *Term of Years* was of ſo little Regard at that Time, that a Man might at Common Law deviſe ſuch an Eſtate by *Will*, which he could not do where he had a *Fee-Simple in Poſſeſſion*, nor where it was in Reverſion expectant upon the Determination of an Eſtate Tail.

By the Statutes before-mention'd it appears, that the Will muſt be in Writing, and as to that Matter ſeveral Caſes have happen'd ſince that Time.

The firſt I meet withal was about fifteen Years after the Statute was made, *viz.* the Teſtator on his Death-bed deſir'd another to *write* his Will, who took ſhort Notes of it, and went Home to write it in Form, and ſoon return'd with it *written*, but before he came the Teſtator was *dead*; yet this was adjudg'd a good Will within the Statute 32 *H.* 8. Sackville *verſus* Brown, Brown's *Caſe*, Keilw. 209 1 And. 34. 1 Brown's 44. *See* Dyer 72.

‖But if one in writing the Will inſerts a Clauſe after the Teſtator is Speechleſs, and without Memory, and without any previous Direction from Hinton's *Caſe*, S. P. ‖Dyer 288.

the dying Man; though this is not a good Will, yet 'tis no Forgery within the Statute 5 *Eliz.*

West's *Case*, Moor 177. If a Man going beyound Sea *writes a Letter*, in which he appoints that his Lands ſhall go in ſuch Manner, this is a good Will in *Writing*.

Cæſar *verſus* Lake, 31 Jac. The Teſtator *intended* to deviſe Lands to *G. D.* for Life, *Remainder* to *B B.* in Fee; but before the Writing of the Remainder he dy'd; adjudg'd, that the Deviſe was void for the whole, within the Statute 32 *H* 8. for the one depended on the other; but if he had intended one Acre for *B.* and another Acre for *W.* and had put the Deviſe of one Acre in Writing, and had dy'd before the Deviſe of the other Acre was written, it had been a good Deviſe for that Acre which was put in Writing, but not for the other.

Naſh *verſus* Edwards, Cro. Eliz. 100. 1 Leon. 113. The Teſtator devis'd his Land by *Parole*, and a Perſon who was preſent recited the Words to him, and aſk'd if it was, and ſhould be his Will, and he affirm'd it ſhould; then the Perſon put it into *Writing* in the Life time of the Teſtator for his own Remembrance but without his Appointment; this was adjudg'd a void Deviſe, becauſe not writ by the *Appointment* of the Teſtator, or by his *Conſent*, yet if he had read it to him, and he approv'd it, in ſuch Caſe it had been as good as if written by his Appointment.

2 Leon. 35. 3 Leon. 79. The Teſtator devis'd his Lands by *Parole*, and did not *appoint* it to be put into *Writing*, but another Perſon, without his Knowledge or Command, put it into Writing in the Life-time of the Teſtator; this happen'd a Year before the Caſe of *Naſh* and *Edwards* laſt mention'd, and it was adjudg'd a good Deviſe.

Downhall *verſus* Careſby, Moor 356. 1 Roll. Abr. 834. Goldſ 126. The Teſtator gave Inſtructions to *write* his Will, and to give his Lands to one of his Sons *for Life*, but the Writer put it down *in Fee*; adjudg'd, that it was altogether void, becauſe it

was

was not the Will of the Teſtator; though one of the Judges would have it to be good for ſo much as it appear'd to be the Intention of the Teſtator, *viz. for Life.*

Where the Writer omits a Legacy which he was directed to inſert, 'tis a Fault, but no Forgery; but if he was directed to write an Eſtate *for Life* to one, with a *Remainder in Fee* to another, and he omits the Eſtate *for Life*, ſo that the Remainder takes Effect in Poſſeſſion, this is Forgery. Coomb's Caſe, Moor 759.

If a Man writes a Will without any Direction, and then upon reading it to the Teſtator he approves it, this is a good Will.

The Lord Chief Juſtice *Wray* in his Argument in *Butler* and *Baker*'s Caſe, tells us, that two Things are requiſite to the Perfection of a Will where *Lands* are devis'd, *viz. Writing*, and the Death of the Teſtator, and that the Writing ought to be full and perfect; and therefore if the Teſtator deſires another to write his Will, and therein to deviſe his Mannor of *Dale* to *R. B.* and his Heirs *upon Condition, &c.* and he writes it to *R. B.* and his Heirs; but before he writ the *Condition* the Teſtator dy'd, this is void, becauſe the Will was imperfect. 3 R. p. 31. *b.*

From all which it may be collected, that though the Law requires Wills ſhould be in *Writing* where Lands are devis'd, yet formerly it was not neceſſary that it ſhould be written in the Teſtator's Life-time; for if Notes were taken by his Direction, and afterwards put in Writing in the Form of a Will, if the Teſtator had dy'd before it was ſhew'd him, it was a good Will, and ſo it would have been if ſuch Notes were read to him, and not engroſs'd.

Deviſe to one and the *Heir Males of his Body*; the Will was *gnawn by Rats*, yet the Pieces were ſo join'd, that with the help of Witneſſes the Will was Allen 2. Erherington *verſus* Erherington.

was prov'd, and it was afterwards produc'd in Court; and though the Clauſe was not ſo plain as it might be read by a Stranger, yet it was found for the Will, and it was gnawn ſince the Death of the Teſtator; for if it had been gnawn before, then it was not his Will at the Time of his Death.

Lawrence verſus Kete, Allen 54.

In Ejectment the Caſe was, Mr. *Dauch* being ſick, devis'd his Lands by Parole to his Wife for Life, and ſeveral Parcels to others in Remainder, and about an Hour afterwards wiſh'd that one *Kete* was there to put it into Writing; immediately the Wife (without the Knowledge of her Huſband) ſent for *Kete*, who wrote the Will from the Mouth of the Witneſſes who heard the Teſtator declare his Mind; but becauſe the Witneſſes differ'd in the Limitation of ſome of the Remainders, *Kete* wrote two Wills without the Privity of the Teſtator, who dy'd before they were finiſh'd; and both theſe Writings were loſt, but Copies of them were produc'd and teſtify'd to be of the ſame Effect with the Originals; adjudg'd, that a Deviſe by Parole may be written from a Witneſs as well as from the Teſtator himſelf; that the Deſire to have his Will written, ought to be within a ſhort Time after the Deſire, that it may appear to be a continu'd Act, otherwiſe there muſt be a new Declaration to make it effectual; that if they agreed as to the Deviſe for Life 'tis good, tho' they diſagreed to the Remainders; that tho' the Teſtator was ſenſeleſs before the Will was quite written, yet 'tis a good Will in Writing; that if a Will is in Writing after the Death of the Teſtator, and loſt or burnt, yet if it can be prov'd by a Copy 'tis good, otherwiſe, if it was loſt or burnt before he dy'd.

But by the Statute 29 *Car.* 2. *cap.* 3. there is a great Alteration made in the Law relating to Wills,

Wills, for now *it must be written in the Testator's Life-time, and sign'd by him, or by some other Person in his Presence, and by his Direction, and subscrib'd in his Presence by three or four Witnesses.*

The Testator devis'd his Lands to Trustees and their Heirs in Trust, that *if within three Years there happen'd to be a Marriage between the Lord* Guilford, *and Mrs.* W. (who was Heir at Law to the Testator) *then to her for Life,* Remainder to her first Son, *&c.* and if that Marriage did not happen, then the Remainder to the *Lord Faulkland* in Tail, *&c.* She did not marry the *Lord Guilford,* but Mr. *C.* who brought a Bill in Equity to have the Lands, as being equal in Family, Estate, and Person to the Lord *Guilford,* suggesting, that his Lady was an Infant, and in no Fault, the Lord *Guilford* differing with the Trustees about the Settlement, and therefore she ought not to lose her Estate for the Fault of another. Upon the Hearing this Cause several Papers, Letters, and Sayings of the Testator were offer'd as Evidence, to prove that the Intention of the Testator was, that it should not be in the Power of the Lord *Guilford* to make the young Lady forfeit her Estate; but it was decreed, that those *Papers, Sayings, &c.* should not influence the Construction of a Will, for that would be to make them Part of the Will itself; when by the Statute of Frauds, *&c.* every Part of a Will must be in Writing, and even before that Statute no collateral Proofs were admitted, either by Papers or Words, because a Will is a consummate Act in itself; and *Chancery* will not relieve in this Case, because the *Condition was precedent* to her taking the Lands, *viz. If she marry'd the Lord* Guilford *within three Years,* then, *&c.* so that for the Non-performance of this Condition Equity cannot relieve, as it might where there is a Forfeiture for Non-performance, because Equity may

Bartie ver. *sus Lord* Falkland. 1 Salk. 231

may make an Eſtimate and give a Compenſation for it. My Lord *Faulkland* had a Decree; but it was revers'd in the Houſe of Peers upon an Appeal.

Witneſſes to Wills.

BY the Civil Law ſeven Witneſſes were requir'd to a Will, and an eighth if the Teſtator could not write his own Name, and five were requir'd to a Codicil; but *de jure Gentium* two Witneſſes were ſufficient. And by the Canon Law all Wills by which any Thing was given *in Pios Uſus*, and ſuch which relate only to ſecular Affairs, were to have three Witneſſes, whereof one was to be the Miniſter of the Pariſh where the Teſtator liv'd.

And in this particular the Canon Law agreeth with our Law, for two Witneſſes are requir'd to prove a Will for Goods, and three at leaſt for Lands, but this doth not come near the Number requir'd by the Civil Law; and therefore 'tis no Wonder, that in theſe Courts where they proceed by that Law, *ſingularis Teſtis eſt nullus Teſtis*, as to the Proof of a Payment of a Legacy, but where ſuch Proof is refus'd, our Courts will prohibit them to proceed.

Chadron *verſus* Harris, Nov 12.

A Will was written in an old Piece of Paper, but not ſign'd by the Teſtator, nor ſeal'd by him, but there were three Witneſſes produc'd to prove it to be his Will; two of them depoſed on the Report of others, but the third had ſubſcrib'd his Name to the Will; and upon this Evidence the Plaintiff had a Verdict. Adjudg'd, that a Will of Lands deviſeable at Common Law was good without Witneſſes if it was put in Writing, and prov'd to be the Teſtator's Hand; and ſo it was adjudg'd in the Caſe of *Gage* and the Company of Fiſhmongers, *Mich.* 12 *Jac.* in *Chancery*, upon Mr *Goddard's* Will, who, by a Paper prov'd to be written by him,

him, had given Lands in *Bray* to that Corporation and their ſucceſſors, to build an Hoſpital for the Maintenance of poor People.

Since that Statute 29 *Car.* 2. ſome Caſes have happen'd concerning the *ſubſcribing Witneſſes*, both as to the *Manner* and *Number*.

Upon a feigned Iſſue the Queſtion was, Whether the Will was duly atteſted, for that the Teſtator deſir'd the ſubſcribing Witneſſes to go into another Room ſeven Yards from the Room where he was, in which Room there was a Window broken, and thro' which the Teſtator might ſee the Witneſſes ſubſcribe; adjudg'd, that it was ſufficient if the Teſtator might ſee them; and that it was not neceſſary that he ſhould be actually in the ſame Room with the Witneſſes; for if ſo, then, tho' in the ſame Room, he might turn his Back to them, and that would make the Will void. Shires *verſus* Glaſcock, 2 Salk. 688.

A Will was atteſted by three Witneſſes, but not at the *ſame Time*; for they ſeverally ſubſcrib'd their Names at the Requeſt of the Teſtator, and at *ſeveral Times*, and were not altogether at the ſame Time; this was decreed a good Will. 2 Ch. Rep. 109.

But where two Witneſſes ſubſcrib'd a Will of Lands, and about a Year afterwards the Teſtator made a *Codicil*, which was alſo ſubſcrib'd by two Witneſſes, of which one of them was a Witneſs to the Will, and the other was a *new Witneſs*, the Will was recited in the Codicil, and confirm'd, and ſome new Diſpoſitions made. The Queſtion was, Whether the *new Witneſs* to the Codicil, who had not ſeen the Teſtator himſelf ſubſcribe the Will, ſhould be a third Witneſs to make it a good Will? It was inſiſted, that though the Will and Codicil were in diſtinct Papers, and made at ſeveral Times, yet they were but one Will; and if but one Will, then there are three Witneſſes to it. But it was adjudg'd, that the ſubſcribing to the *Codicil* was not a ſub- Lea *verſus* Libb. 1 Shore 68. 3 Mod. 262

a ſubſcribing to the *Will*, ſo it was void for want of three Witneſſes, which are requir'd by Law.

Chater verſus Hawkins, 3 Lev. 426.

The Teſtator *Hawkins* having a great perſonal Eſtate, and being in *Newgate*, and a little diſturb'd in Mind, made his Will, atteſted by Witneſſes. The Will was conteſted, and upon hearing the Cauſe in the Prerogative Court, Sentence was given againſt the Will; and upon an Appeal to the Delegates, two Records were produc'd to avoid the Teſtimony of two of the Witneſſes to this Will, by which it appear'd, that one of them was convicted *for a Libel*, and the other for *ſinging a Ballad againſt the Government*, and both of them adjudg'd to the Pillory, but no Proof that they ſtood in it; after thoſe Witneſſes were examin'd in the Spiritual Court, and before Sentence given, there came a Pardon, by which they were pardon'd. The Queſtion was, Whether the Depoſitions taken in the Spiritual Court ſhall be admitted for Evidence? It was agreed, that if their Teſtimony was not good at the Time it was taken, the ſubſequent Pardon would not make it good; and that the Judgment of Pillory makes the Infamy, tho' it was never executed; but the Queſtion was, Whether the Judgment for thoſe Crimes ſhould make them infamous, becauſe 'tis not from the Judgment, but from the Nature of the Crimes that the Infamy ariſes; 'tis true, the Judgment to the Pillory imports Infamy at Common Law, but not by the Canon or Civil Law, unleſs the Cauſe was infamous; and 'tis by theſe Laws that this Caſe is to be determin'd, and for this Reaſon the Sentence in the Prerogative Court was revers'd, and the Will decreed to ſtand.

cap. 14. By the Statute 4 & 5 *Anna* it is enacted, that all ſuch Witneſſes as are allow'd to be good on Trials at Law, ſhall be deem'd good Witneſſes to prove any *Nuncupative Will, or any Thing thereunto relating.*

ante 433.

F I N I S.

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